

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 IN SEATTLE

4 UNITED STATES OF AMERICA, et al,)
5)
6 Plaintiffs,) No. C70-9213
7) Subproceeding 01-1
8 v.)
9) FINAL
10 STATE OF WASHINGTON, et al.,)
11)
12 Defendants.)
13)

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE RICARDO S. MARTINEZ

16 October 15, 2009

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1 THE COURT: Counsel, we had left off yesterday,
2 concluded the testimony of Ms. Walter. So are we ready from
3 another witness from the plaintiff?

4 MR. TOMISSER: What we would like to do, if we can, your
5 Honor, is we are prepared to offer the State's response to the
6 plaintiffs offer of proof yesterday regarding Section 5 of
7 Mr. Rawson.

8 THE COURT: Mr. Tomisser, if I could have you step to
9 the podium?

10 MR. TOMISSER: Your Honor, yesterday afternoon the
11 plaintiffs were allowed to make an offer of proof regarding a new
12 theory of calculating what will lead to an estimate of lost fish
13 through Mr. Rawson in this case, testimony we have objected to on
14 a couple of bases. The Court allowed the offer of proof to go
15 forward in this particular case, and last night when we had an
16 opportunity to try and sit down and read the new material, and
17 understand it, it quickly became apparent that our ability to
18 respond to that was going to require the biologist herself to
19 explain to the Court what had happened between what was excluded
20 by the Court in limine and now what is being done in response to
21 that order. And so in order to respond to the plaintiffs' offer
22 of proof the State would like to call Dr. Paul Sekulich to the
23 stand and make an explanation to the Court, as our response to
24 this case, to that evidence.

25 THE COURT: How long will it take, Counsel?

1 MR. TOMISSER: It will probably take about 15 minutes to
2 run through that offer. We would call Dr. Paul Sekulich.

3 THE COURT: All right. Good morning.

4 Whereupon,

5 PAUL SEKULICH

6 Called as a witness, having been first duly sworn, was examined
7 and testified as follows:

8 THE CLERK: Please state your full name and spell your
9 last name for the record.

10 THE WITNESS: My name is Paul Thomas Sekulich, last name
11 spelled S-E-K-U-L-I-C-H.

12 THE COURT: You may inquire, Counsel.

13 DIRECT EXAMINATION

14 By Mr. Tomisser:

15 Q Good morning, Dr. Sekulich.

16 A Good morning.

17 Q Would you please provide the Court with a brief summary of
18 your educational qualifications?

19 A Education wise, I received a Bachelor of Science degree in
20 fisheries from Colorado State University, a Master of Science
21 degree in fish biology from Colorado State University, a Ph.D. in
22 forest science and fisheries from the University of Idaho in
23 1980.

24 Q And can you also give the Court a summary of your
25 professional experience?

1 A Subsequent to the advanced degrees I gained employment with
2 the Department of Fisheries and the Department of Fish and
3 Wildlife, a 12-year stint in harvest management, successively
4 more difficult responsibilities, ending with a division manager,
5 the head of Puget Sound Harvest Management, in what was called
6 the PSHM program. The last ten years was spent as a division
7 manager in the restoration division in the habitat program with
8 the Department of Fish and Wildlife.

9 Q And have you had involvement with what is referred to as the
10 priority index?

11 A Yes. The priority index is a methodology that I compiled
12 with the help of my staff in the early 1990s.

13 Q And can you describe to the Court what you were trying to do
14 in the development of the priority index?

15 A The priority index methodology was first envisioned
16 subsequent to a memorandum of understanding between the
17 Department of Transportation and Fisheries and Wildlife that
18 called for an inventory of fish passage barriers on state roads.
19 Subsequent to that the legislature allocated money for inventory
20 and prioritization. So what we did in the Department of
21 Fisheries was compile this methodology to prioritize those
22 barriers on state roads.

23 Q And then with the assistance of your staff, is it accurate to
24 say, you were the creator of that methodology?

25 A Yes.

1 Q Do you have an expertise in the subject matter of fish
2 passage and barrier issues?

3 A Yes.

4 Q And can you describe your experience in that area?

5 A Well, the expertise, basic salmon biology, in the conduct of
6 securing the Ph.D. degree in forest science and fisheries, but
7 also the experience of 12 years in habitat management,
8 specifically the environmental restoration division that
9 concerned itself with fish passage, fish screening and habitat
10 restoration.

11 Q In preparing and assisting in this case, Dr. Sekulich, have
12 you had an opportunity to review the depositions and direct
13 testimony provided by the tribal witnesses in this case?

14 A Yes.

15 Q And have you also had an opportunity now to review the
16 revised declarations provided by tribal witnesses in this case?

17 A Yes, last night I was able to review them briefly.

18 Q And that would be revised testimony by Mr. Rawson, Mr. Waldo
19 and Mr. Meyers; is that correct?

20 A That's correct.

21 Q I would like to ask you about the revised declaration
22 provided by Mr. Rawson to start with. And can you describe for
23 the Court what change was made, in terms of the use of ranges, as
24 compared to what was done the first time?

25 A The first time there was a table in Section 5 that took

1 estimates that were used in priority index methodology that was
2 compiled by the Department of Fish and Wildlife. There was a
3 table that expressed those as point estimates. The revision
4 showed results of a literature search and expressed those
5 production values, which were adult equivalents in a square meter
6 of habitat, and expressed those as a range.

7 Q And are the authorities that were relied upon by Mr. Rawson
8 in presenting those ranges to the Court authorities that are
9 generally accepted by fish passage experts for the purpose
10 intended here by Mr. Rawson?

11 A No, not to my knowledge. There was no one in Fish and
12 Wildlife that had reviewed those values. I don't know if they
13 are reviewed by any fish passage experts.

14 Q I would also like to ask you about the H factor, which if I
15 understand correctly, is part of the priority index; is that
16 correct?

17 A That's correct.

18 Q And with the intent of the priority index, how is the
19 H factor used in that formula?

20 A Well, to maybe expand on that a little bit, the priority
21 index that is calculated for an individual barrier yields a
22 relatively priority for that barrier for correction, numbers
23 ranging from 1 to 100. The higher the number the higher priority
24 for correction. The components of the priority index of an
25 individual facility is a product of what is called BPH and MDC,

1 with some mathematical manipulation of those factors. The BPH
2 portion of that model expresses the adult equivalent salmonids
3 that could potentially be produced with the correction of that
4 barrier. It is important to note that BPH portion is a relative
5 tool. It is merely meant to be a priority tool and not to yield
6 an absolute number of adult equivalents.

7 Q So is it still a misuse of the H factor in the way that it
8 has been set up in the new sequence from Mr. Waldo, Mr. Rawson
9 and others?

10 A In my opinion it is, because it doesn't parse out the habitat
11 for an individual project, that then is inserted into a priority
12 index for prioritization. In this case it is an aggregate number
13 that lends itself to, again, inappropriate use of the H value.

14 Q And when you say "inappropriate use," do you mean that it is
15 a use other than what the PI was designed and intended to do?

16 A That's correct.

17 MR. TOMISSER: Thank you, Dr. Sekulich.

18 THE COURT: Mr. Tomisser, that concludes the offer of
19 proof on behalf of the State?

20 MR. TOMISSER: Other than argument. I don't know if the
21 Court wants argument now on this or not in order to make a ruling
22 on what we are going to do with the scope of the testimony on
23 behalf of Mr. Rawson and how that impacts other witnesses
24 potentially.

25 THE COURT: Let me have our witness go ahead and step

1 down. Thank you.

2 MR. MORISSET: We might want some opportunity to
3 cross-examine their witness at some point, your Honor, depending
4 on your views on how to proceed.

5 THE COURT: Here is what I think is going on now and why
6 I don't think we need cross-examination. The testimony that was
7 proffered yesterday, Mr. Morisset, by Mr. Rawson, and I assume
8 will be followed up with other witnesses potentially today, to me
9 it is really no different than you have differences of opinion
10 from different experts that are putting that forth, just like any
11 other case, in terms of how it is these figures are arrived at.
12 The Court, in its motion in limine, already indicated that it is
13 skeptical about many of these figures. And I am looking at them
14 in that way. However, I believe that both sides certainly have
15 the opportunity to put all that evidence in, all that testimony
16 in, and the Court can weigh and balance what it thinks really has
17 weight and what doesn't have weight. So the offer of proof, as I
18 see it, from the government is simply this is the rebuttal to the
19 argument of why we should have allowed Mr. Rawson's testimony and
20 these other witnesses. I don't really think cross-examination is
21 necessary. It is simply his explanation of this methodology that
22 developed, that in his opinion it is incorrect to be used in the
23 way Mr. Rawson, and maybe some of these other experts, have used
24 it, for whatever good that does. All right.

25 MR. MORISSET: Certainly. We would point out that we

1 believe Mr. Sekulich has misrepresented what we said we were
2 doing. We did not say we were producing absolute numbers of
3 fish, was the phrase he used. We would -- I guess we can argue
4 that, your Honor.

5 THE COURT: I think so. Thank you. Mr. Tomisser, does
6 that answer your question about what we are doing and how we are
7 doing it?

8 MR. TOMISSER: Yes.

9 THE COURT: Next witness. Mr. Stay, good morning.

10 MR. STAY: Good morning, your Honor. I am not the next
11 witness, nor am I going to present it. There was one detail of
12 yesterday that we were going to try to clear up with Mr. Shaftel.
13 There was a reserved objection to a sentence or two on page 11.
14 Mr. Shaftel, I believe, is going to withdraw his objection based
15 upon my representation that section was not being submitted for
16 the truth or falsity of that but as an example. Am I correct?

17 MR. SHAFTEL: Let me just clarify, that the objection
18 was just to the representation of the numbers that she used with
19 regard to the State budget, and whether or not those numbers in
20 fact were accurate. And to the degree the Court is not looking
21 at those numbers for the matter asserted, the State doesn't have
22 an objection for that particular part of her testimony being
23 allowed in, merely for the purpose of showing that she was
24 looking for a plan and in fact found one on line.

25 THE COURT: Thank you, Mr. Shaftel. We are discussing

1 AT-009, a sub-portion of that. Thank you for reminding me,
2 Mr. Stay. We went a little late yesterday, so I was kind of
3 anxious to get all my staff out of here, but we should have taken
4 care of that yesterday.

5 MR. STAY: That was my last question. I should have
6 asked it yesterday.

7 THE COURT: I love the jacket/bow tie combination.

8 MR. STAY: I didn't expect to be up today.

9 MR. MORISSET: May it please the Court, Mason Morisset,
10 attorney for the Tulalip tribes. For the record, I already
11 remonstrated Mr. Stay on his dress.

12 Our next witness will be Mr. Tyson Waldo. And we have
13 similar procedures we need to cover as we did with Mr. Rawson,
14 your Honor. We need to offer the original AT-008 as an offer of
15 proof to preserve it for the record. We need to offer his
16 revised declaration, which was redacted in conformance, we
17 believe, with the Court's order. And then we have some exhibits
18 which I am either a little confused on, as to whether they got in
19 or not, or there may be continuing objections from the Attorney
20 General. So that's kind of the three things we need to do. And
21 I will presume that the Attorney General will pop up at
22 appropriate points.

23 MR. TOMISSER: That would probably be now, your Honor.
24 In terms of the exhibits, in the flurry this morning Mr. Morisset
25 was asking me about some of the remaining exhibits, maps

1 generated by Mr. Waldo. In the two minutes that I had to look at
2 them I have had a chance to review them, and we will be
3 withdrawing our objections to the maps you were asking about.

4 THE COURT: Let's take it one step at a time. I want to
5 keep our record absolutely clear. We are talking about AT-008.

6 MR. MORISSET: I have renumbered that as A, to make it
7 clear. That is the original, portions of which were excluded by
8 your Honor.

9 THE COURT: I understand.

10 MR. MORISSET: I have handed up a revised version and
11 labeled it 008-B.

12 THE COURT: Thank you. So A is the original declaration
13 of Mr. Waldo. And, again, to preserve the appeal for the
14 plaintiffs, that will be put into the record. B is now the
15 redacted version?

16 MR. MORISSET: That's correct.

17 THE COURT: Mr. Tomisser, any other objections, other
18 than ones already made discussing the methodology issues?

19 MR. TOMISSER: No, your Honor.

20 THE COURT: AT-008-B will be admitted. We have already
21 got his resume in. That is 008-1. We have already got the maps,
22 map one, map two, which is 8-2 and 8-3, in. Are we discussing
23 8-4 now, Mr. Morisset?

24 MR. MORISSET: That's why I brought this up, is that I
25 am not clear where we are. I am not sure what Mr. Tomisser is

1 saying on 4, 6 and 11 through 18, which I didn't have listed as
2 admitted or not. And we just need to proceed cautiously here and
3 make sure we are all on the same page. And I can put Mr. Waldo
4 on the stand to explain those, if need be.

5 THE COURT: Hang on a second. Let me ask the State.
6 The 008-2, the case area scale map one, and 008-3, are both in.
7 No objection. There was an objection to 4, an objection to 6.
8 5, 7, 8, 9 and 10 are all in. So, as Mr. Morisset says, we are
9 looking at 8-11 through 8-18. 17 and 18 are tables. The rest of
10 them are from the description in the pretrial order. It appears
11 they are all maps.

12 Mr. Tomisser, does the State have any continuing objection?
13 Let's take them one at a time.

14 MR. TOMISSER: Your Honor, I think it will take us a
15 moment to look at these. Not all of them were attached to the
16 new declaration. We think that 11 was an attachment that was
17 part of the original testimony from Mr. Waldo that remains
18 excluded in this case. I think it will take us a while to sort
19 this out exactly.

20 THE COURT: How long is a while? Ten minutes?

21 MR. MORISSET: A little colloquy with the counsel and
22 the witness off the record might help.

23 THE COURT: Why don't we take a short, 10-minute recess?

24 (Break)

25 THE COURT: All right, gentlemen, we're back on the

1 record. Mr. Morisset or Mr. Tomisser, where are we in terms of
2 the proposed exhibits?

3 MR. MORISSET: May it please the Court, I think we have
4 beat each other to an impasse. No. I think we've come to an
5 agreement. I would like to call the witness to the stand to
6 explain on the record what we've done and make sure that we've
7 adequately explained it to both Counsel and Court.

8 THE COURT: That's fine.

9 MR. MORISSET: I call Tyson Waldo.

10 THE COURT: Mr. Waldo, good morning. If we could have
11 you stand and raise your right hand, please, to be sworn in.
12 Whereupon,

13 TYSON WALDO

14 Called as a witness, having been first duly sworn, was examined
15 and testified as follows:

16 THE CLERK: Will you please state your full name and
17 spell your last name for the court reporter.

18 THE WITNESS: Tyson Zane Waldo, W-A-L-D-O.

19 THE COURT: Mr. Waldo, there's water on your left if you
20 need it.

21 You may inquire, Counsel.

22 DIRECT EXAMINATION

23 By Mr. Morisset:

24 Q Mr. Waldo, where are you currently employed?

25 A I'm employed at the Northwest Indian Fisheries Commission as

1 the Puget Sound SSHIAP program habitat biologist. I'm also
2 employed at Western Washington University as a GIS instructor.

3 Q And have you prepared a declaration for this case, which I
4 believe you have before you, marked AT-008-B?

5 A Yes.

6 Q And is that -- would that be your testimony today if you were
7 to give it live as opposed to in writing?

8 A Yes.

9 Q And attached to that, there's a map entitled, "State- Owned
10 Barrier Culverts Used by Plaintiff Tribes to Estimate the
11 Potential Habitat Upstream," which I believe I have up on the
12 screen. Is that correct?

13 A Correct.

14 Q Is my understanding that this was revised in connection with
15 the Court's order on redacting certain information and would be
16 considered a new version of the original AT-008-11?

17 A Correct.

18 Q And what does this show briefly, in summary?

19 A This shows the State-owned barrier culverts used by plaintiff
20 tribes to estimate the potential habitat upstream.

21 In my revised declaration, I redacted -- I redacted the
22 production numbers that we had been providing. And in so doing,
23 the maps showing the sites that were used for those production
24 numbers also changed. I kept habitat -- potential habitat
25 upstream in my revised declaration. And this map represents the

1 sites that we used for estimating potential habitat upstream as
2 opposed to the sites we were using for estimating potential
3 production.

4 Q And what are the little black dots all over the map? What
5 does that represent?

6 A There's two -- I guess it's black to us. It's actually red
7 dots and black dots. The red dots represent --

8 Q Excuse me. Are the red dots what would be smaller on this
9 map?

10 A Yeah. Those are the sites that were used in the calculation.
11 And now there are 668 sites that we used to look at potential
12 habitat upstream. What that refers to is -- lineal gain is one
13 of the measures of potential habitat. There are 487 sites from
14 FPDSI, and then there are 181 sites from DNR that we were able to
15 use for our potential lineal gain estimation.

16 And then the other 829 sites are sites that didn't have --
17 either didn't have lineal gain data associated with them or any
18 habitat data associated with them or that were a barrier upstream
19 of a downstream barrier. Any barriers upstream had to be removed
20 as well so as not to double, triple, or quadruple count habitat.

21 THE COURT: Counsel, I just need to clarify. Are these
22 culverts you're talking about, then?

23 THE WITNESS: Yes.

24 THE COURT: Each of these little dots?

25 THE WITNESS: Yes.

1 By Mr. Morisset:

2 Q To follow up on the Court's question, and to make sure we're
3 clear, are these sites which mean there may be more than one
4 culvert at some of these sites?

5 A In the case of this map, they're the actual -- the culverts
6 that may be -- so one site may have multiple culverts, in the
7 case of these maps where I'm showing the culverts. And so there
8 could potentially be two culverts at a site.

9 Q Then also attached to your revised declaration is something
10 labeled Table 1. Does that look like the table?

11 A Yes.

12 Q Do you have a copy of it with your declaration? And would
13 you briefly describe what this is?

14 A It's a summary table by WRIA and by state ownership. The
15 WRIA -- it's the case area -- or the table represents the case
16 area, and the case area, starting with WRIs 1 through 23, which
17 are the case area WRIs.

18 And then the state ownership is broken into basically DOT and
19 DNR. And that break also represents the FPDSI data base from the
20 DNR data sets. And then there's habitat summaries in length and
21 in miles, spawning habitat in meters squared, and rearing habitat
22 area in meters squared. So both the spawning and rearing are
23 area numbers, and then the length is a linear length number.

24 Q Now, WRIA stands for the first column, W-R-I-A?

25 A Um-hum.

1 Q And just explain what that acronym is, please.

2 A Water Resource Inventory Area.

3 Q Does that coincide with what we might say are the major river
4 systems in the western part of the State?

5 A Yes.

6 MR. MORISSET: Now, your Honor, I think that I will --
7 well, maybe I won't make a multipart motion, which is difficult.
8 I'll make one motion at a time.

9 I would like to identify Table 1 as -- after discussing this
10 with defense counsel, I think we have agreement that we should
11 label it a new exhibit number, AT-008-19, and move for its
12 admission as an exhibit.

13 THE COURT: Is that the one we have on the screen,
14 Counsel?

15 MR. MORISSET: That's the one the screen, your Honor.

16 THE COURT: Mr. Waldo --

17 MR. MORISSET: Your Honor, may I explain that we had two
18 earlier tables which are now simply part of the original offer of
19 proof. In effect, it's a little bit of a misstatement. We're
20 replacing those with this and giving it a new number to keep
21 clarity here.

22 THE COURT: That's my understanding. I assume for
23 Table 2, then, we'll use 008-20?

24 MR. MORISSET: No. We're just doing one table now.

25 THE COURT: Just one?

1 MR. MORISSET: 19. And there will be no 20.

2 THE COURT: All right. Before we do that, can you just
3 run through this with me and look at WRIA 1, Department of
4 Fisheries and Wildlife/DOT.

5 Length, you're talking about the length of the stream.

6 THE WITNESS: Yeah. So for however many pipes in
7 WRIA 1, or however many culverts that had habitat surveys
8 associated with them, as part of the habitat survey they measured
9 length upstream, and they measured it in meters. I converted it
10 from meters into miles just because it's a more meaningful number
11 to communicate at this scale.

12 And then I summarized for a particular WRIA all those
13 culverts with associated habitat survey data. And from that
14 summary, I came up with this length measurement which happens to
15 be, for WRIA 1, 58 miles.

16 THE COURT: And then the spawn?

17 THE WITNESS: The spawning habitat is an area, so it's
18 in meters squared, and it's the same -- the summary process was
19 the same. For sites where there was a habitat record associated
20 for a culvert in a particular WRIA, if there was spawning habitat
21 measured, that site would then be used -- it would then aggregate
22 all the sites that had spawning habitat measured. And from that
23 aggregation, I would get this number, this 41,992 square meters
24 of spawning habitat.

25 THE COURT: That's your calculation?

1 THE WITNESS: That's my summary. The measurement of
2 spawning habitat actually comes from a field measurement using
3 the habitat survey data. So the measurement is from field data.
4 My summary of spawning habitat -- yeah, the summary is mine.

5 THE COURT: All right. And then rearing?

6 THE WITNESS: Rearing, the same as both spawning and
7 length. I got that from the actual habitat record as it's
8 associated with culverts, and then I summarized those habitat
9 records of rearing area on a WRIA by WRIA.

10 THE COURT: All right. Thank you.

11 So you're asking to admit 008-19?

12 MR. MORISSET: Correct, your Honor.

13 THE COURT: Any other objections from the State?

14 MR. TOMISSER: No other objections, your Honor.

15 THE COURT: Then that will be admitted.

16 MR. MORISSET: Defense counsel has been very cooperative
17 in trying to help me clear where we are on the rest of the maps.
18 If I misstate things, I'm sure I'll get a response. But I think
19 we also have agreement now to admit the rest of the exhibits
20 which were not admitted before. And that would be AT-008-4, -6,
21 and -11(b), which is the new version of -11, -12, -13, -14, -15
22 and -16, as well as the new -19. I would move for admission of
23 those. And I apologize in advance for the fact there still may
24 be some confusion.

25 THE COURT: Any objection from the State?

1 MR. TOMISSER: No.

2 THE COURT: All right.

3 MR. MORISSET: Counsel was asking about AT-008-17, which
4 at one time we had new versions but were not -- in effect, we've
5 replaced those with the new -19.

6 THE COURT: That was my understanding. So -17 is gone?

7 MR. MORISSET: Well, -17 and -18, in their original
8 versions are in the original offer of proof.

9 THE COURT: Yes.

10 MR. MORISSET: They are not part of the new declaration.

11 THE COURT: Thank you.

12 MR. TOMISSER: That's our understanding as well, your
13 Honor.

14 THE COURT: All right. Then the remainder of those
15 exhibits dealing with the declaration of Tyson Waldo are now
16 admitted. You may continue, Mr. Morisset.

17 MR. MORISSET: Then I guess all that's left is a need to
18 move the admission of the revised declaration of Tyson Waldo,
19 which I have labeled AT-008-B.

20 THE COURT: We've done that already.

21 MR. MORISSET: We have done that? Then thank you, your
22 Honor.

23 I believe that is all. I think we're completed. Nothing
24 further on direct.

25 THE COURT: Cross-examination for Mr. Waldo.

CROSS-EXAMINATION

By Mr. Tomisser:

Q Good morning, Mr. Waldo.

A Good morning.

Q For the record, we want to congratulate you on the most frequently deposed person.

A Thank you.

Q Mr. Waldo, I want to ask you about some of your terminology in this particular case. The various maps and charts that you have generated in this case are all carefully labeled as estimates of potential gains made; is that correct?

A Correct.

Q And the reason that they are labeled as potential gain is because of the presence of non-state barriers along the river and stream systems; is that correct?

A The reason that they're -- not specifically. I mean, generally I think that's part of why they are called potential, yes.

Q Because if there is a stream system that has a state barrier, and then either above or below that, that would effect the amount of gain that you could actually achieve, because there would still be blockages even if the state barrier was removed; is that true?

A That would affect the amount of gain that you could actually achieve at the time that I did this assessment.

1 Q That was my question.

2 A Okay.

3 Q And also in terms of -- I think you also were going to
4 explain a moment ago, in terms of why this is referred to as
5 potential, is that your numbers, in terms of making these counts,
6 also don't take into account what the quality of the habitat
7 might be that's being gained; is that correct?

8 A I don't think that is a correct statement.

9 Q Do your numbers take into account the quality of the habitat?

10 A When the habitat is surveyed through the WDFW methodology,
11 there are multiple ways that the quality of the habitat is
12 ascertained, the quality from the perspective of hydrology, so
13 we're looking at a 60-day low flow.

14 And then in terms of the habitat quality modifiers, the
15 surveyors are looking at water temperature; they're looking at
16 stream condition; they're looking at riparian condition; they're
17 looking at morphology; they're looking at substrate. When you
18 take all of those things together and you take into account that
19 they're being assessed in the field, I would argue that habitat
20 quality is very much a part of this habitat number that we're
21 looking at.

22 Q My question, Mr. Waldo -- and I don't disagree with any of
23 that. I understand that those measurements are there. I'm
24 simply trying to understand, from what you have presented here,
25 in terms of when we come up with a number, I think the example

1 was 50 something miles in WRIA 1 as potential gain.

2 Simply looking at that number doesn't tell us anything about
3 what the quality of the habitat along that 50 miles might be.
4 We'd have to look at other data to find out what the quality of
5 the 50 miles is.

6 A I guess the way that I see it is that when you look at that
7 58, for example, if you took it at 100 percent and you hadn't
8 already applied those quality modifiers, that 58 might be
9 something like 137. So you've already factored in the quality of
10 the habitat. And the way that you've factored it in is you've
11 actually minimized the amount of gain that you're going to have.
12 You're taking that into account.

13 So I would say even in summary, the habitat quality modifier
14 is still a part of that value. That's the way I see it.

15 Q In looking at the surveys that have been done, in terms of
16 people trying to go out and inventory how many culverts there are
17 and where they are and who owns them, you've had a chance to
18 review that data, haven't you?

19 A Could you be more specific?

20 Q Have you had a chance to review inventory data that lists the
21 identification and location of culverts?

22 A Like the actual habitat survey files?

23 Q Yes.

24 A Yes.

25 Q And in reviewing those files, is it true that we can tell

1 that the database, in terms of non-state-owned barriers is
2 incomplete?

3 A From reviewing the habitat survey files, I don't think that I
4 can make the conclusion from those particular files, no.

5 Q Is it true, based on any of the material that you've
6 reviewed, that you can tell that the inventory data that we have
7 on non-state-owned barriers is incomplete?

8 A The FPDSI database, data continues to be collected and put
9 into the FPDSI database.

10 Q I guess maybe a simpler way of getting to this point,
11 Mr. Waldo, is, is it your belief that there are probably
12 additional non-state-owned barriers within the case area that
13 simply haven't been identified and put into the data base yet?
14 Do you think that's probably true?

15 A I think that's potentially true. And I also -- it's
16 potentially true that there are additional state-owned barriers
17 that haven't been put into the database yet.

18 Q There may be more?

19 A Yeah.

20 Q Have you had a chance in this case, Mr. Waldo, to review some
21 of the work and mapping that was done by Brian Benson?

22 A Yes.

23 Q And let me show you an example of one of his maps that was
24 similar to what you did in terms of putting dots on a map.

25 Do you recognize this as typical of the sorts of maps that

1 you reviewed that were generated by Mr. Benson?

2 A I recognize this as typical of the maps that were generated
3 by Mr. Benson. This particular situation, I don't recognize that
4 as typical of most situations with regard to how many non-state
5 barriers there are in relation to state barriers.

6 Q The situation for Little Bear Creek is what's represented
7 here, correct?

8 A Correct.

9 Q And so in other situations, the proportion of how many
10 state-owned barriers there are and how many non-state-owned
11 barriers there are is different in different areas, correct?

12 A Correct. I found in most cases, there were -- it's
13 different, yeah.

14 Q And so as part of the analysis here, Mr. Waldo, in looking at
15 a stream system, is you would need to look at state-owned
16 barriers in relationship to non-state-owned barriers that might
17 be either upstream or downstream of the state-owned barriers; is
18 that correct?

19 A As part of the survey, upstream and downstream barriers are
20 sort of noted -- when they're doing habitat survey? Yeah, that
21 is correct.

22 Q And in doing your review, Mr. Waldo, on how many instances
23 were you able to determine that a non-state-owned barrier was
24 downstream of a state-owned barrier?

25 A I don't recall.

1 Q It's in your tables, though, correct? Those numbers were
2 presented in a table that you generated?

3 A Correct.

4 Q So we can review those later?

5 A Yes.

6 MR. TOMISSER: I think those are all the questions I
7 have for you, Mr. Waldo. Thank you.

8 THE COURT: Any redirect?

9 MR. MORISSET: Yes, your Honor.

10 REDIRECT EXAMINATION

11 By Mr. Morisset:

12 Q Mr. Waldo, I've placed the new AT-008-11(b) on the screen.
13 This indicates in the legend that the culvert data sources are on
14 the left bottom; is that correct?

15 A Correct.

16 Q I assume that is the source, then, of the information that
17 made up the map?

18 A Correct.

19 Q Could you explain what the first data source is there? The
20 acronyms, can explain what those are?

21 A The first data source is the WDFW WSDOT FPDSI database. I
22 fear if I try to spell out what FPDSI stands for, I might get it
23 wrong. But it is the DFW compiled and managed database for road
24 crossings, for both state-owned and non-state-owned road
25 crossings.

1 And then the DNR R008653 culvert shape file, that's the shape
2 file that is provided to show the current state, or at least at
3 that point, November of '08, I think, the current state of DNR
4 culverts that had been surveyed and put into the GIS.

5 And then the PI-221, all fish barrier costs. 7-03 XLS table,
6 that's where DNR was storing the old habitat in their version of
7 the PI data. And then the barrier XLS is another part of the
8 DNR's barrier survey, or data system barriers, as is the
9 DNR-repaired barriers November 2008, also part the DNR's data
10 system for barrier data.

11 Q And DNR is the Department of Natural Resources?

12 A The Washington Department of Natural Resources.

13 Q These are all state agencies?

14 A Yes.

15 Q All state-generated data?

16 A Yes.

17 Q Now, still referring to AT-008-11(b), in response to
18 questions by defense counsel as to the nature of what potential
19 habitat meant, is it -- I guess, once again explain what the 829
20 large dots are that were not used and why they were not used in
21 your calculation of estimated potential habitat.

22 A They either did not have a habitat survey associated with
23 them or they were a culvert that had a habitat survey associated
24 but that were upstream of a downstream culvert. In these
25 databases, from each culvert they do a full -- they count habitat

1 completely to the upstream natural barrier. So if you have
2 multiple culverts upstream of a bottom one, you potentially will
3 overcount that habitat. So you have to pull those out to make
4 sure you're counting from the bottom and then going up.

5 Q So is it fair to say your map accounts for those state
6 blocking culverts which, however, may be above some other
7 blocking culvert or for some other reason have habitat that you
8 didn't use in your calculations?

9 A The habitat is accounted for, yes.

10 Q But not twice?

11 A Not twice.

12 Q Does Exhibit AT-8-11(b) show whether the non-state culverts
13 are partial or total blocking?

14 A No.

15 Q In the example that Counsel showed you of Little Bear Creek,
16 would you label that a typical example or an exception to the
17 culverts that show on your map?

18 A I would label that as an exception.

19 MR. MORISSET: Nothing further, your Honor. Thank you,
20 Mr. Waldo.

21 THE COURT: Mr. Waldo, before you step down, I just need
22 some clarification on your Table 1, the one we went over with the
23 WRIAs and your estimation of habitats in terms of miles and
24 spawning and rearing.

25 You, in response to Mr. Tomisser's questions about habitat

1 quality, used a term -- you said, "quality modifiers of habitat."
2 Tell me again how you came up with first column figure in terms
3 of the number of miles.

4 THE WITNESS: The number of miles doesn't -- the way
5 that I came up with the figure was to take the habitat survey
6 data that the State had generated and had made part of their
7 FPDSI database, and then I located the culverts that had those
8 surveys associated with them within their particular WRIAs, so I
9 was able to then, by WRIA, anything within that boundary could
10 get summarized into that WRIA.

11 THE COURT: Now, how does the State come up with that
12 particular number versus measuring and saying this stream is --
13 or all these tributaries would be 127 miles? When you said
14 "quality modifiers of habitat," are there other factors that the
15 State takes into account when they come up with that final
16 number?

17 THE WITNESS: With regards to area, yeah. The number
18 we're talking about right now that you're asking about is the
19 length number. The way the State comes up with the length number
20 is during the habitat survey, they actually have a string box,
21 right, if it's a field survey? And as they're walking up the
22 stream to do that, I think to the tenth of a meter, they're
23 measuring that habitat. So by the time they're done going to
24 each particular anadromous barrier, because it would natural
25 barrier of anadromy, they can then take that -- they'll take all

1 habitat they've measured and summarize it for that particular
2 culvert. And then I just simply took those culvert summaries and
3 summarized them for a particular WRIA. So that's how you get the
4 length number.

5 In terms of the spawning and rearing number, the State
6 measures habitat area. So, again, in the field, they'll have
7 what's called a stadia rod, and they can measure lengths of a
8 particular habitat unit, widths of a particular habitat unit, to
9 get an area. And then upon that, they apply a 60-day low-flow
10 factor which minimizes it to just say that -- to make sure that
11 we're talking about a summer low flow, the minimum habitat.

12 And also while the State -- or while a particular survey is
13 in the field, they're taking into account substrate quality,
14 riparian quality, shading, in-stream cover, the actual morphology
15 of a particular habitat, other things that might be going on
16 environmentally. And those are factored into basically a system
17 of weights that can sort of say from excellent to poor. And
18 they'll apply that particular factor to the area that they've
19 measured to further minimize it, including -- I mean by the
20 quality of its habitat.

21 THE COURT: And aren't those necessarily subjective to a
22 certain degree?

23 THE WITNESS: I believe there's such a thing as limited
24 subjectivity. And I think that when you take an experienced
25 surveyor and you put them in the field, and they're engaging all

1 five of their senses while they're also measuring something, then
2 I think you very much have limited their subjectivity, and it's a
3 relatively objective measurement at that point.

4 Also, the fact that -- you're not saying, Tell me if it's
5 good or bad. You're actually giving them some criteria as to
6 what is good and what is bad, and you're splitting it into three
7 or four categories, so that person really can fit their
8 subjectivity into a smaller box.

9 THE COURT: And can that change over time?

10 THE WITNESS: The condition of the habitat could change
11 over time. I think that that process -- the actual way that it's
12 measured and the way they're looking at it, yes. But I think
13 that process happens rather slowly.

14 THE COURT: Thank you.

15 THE WITNESS: Yeah.

16 THE COURT: Any other questions based on that?

17 MR. MORISSET: One followup in response to the Court.

18 By Mr. Morisset:

19 Q As to these modifiers that are used to give what I would say
20 is a conservative view of habitat for spawning and rearing area,
21 you use the words "area morphology."

22 Would you explain what that means?

23 A I use the word "morphology," as in habitat unit, so that
24 you're looking at pools -- sort of literally the shape of the
25 streambed and how that affects the type of habitat you have,

1 looking at a pool as opposed to a ripple as opposed to a glide as
2 opposed to a pond. Those breaks happen because of morphological
3 breaks in the stream.

4 Q And those are all considered by the surveyors that are
5 preparing this?

6 A The surveyors are breaking out habitat units based on those
7 breaks.

8 MR. MORISSET: Nothing further, your Honor.

9 MR. TOMISSER: I have one question based on the Court's
10 questioning, your Honor.

11 RECROSS-EXAMINATION

12 By Mr. Tomisser:

13 Q Mr. Waldo, in calculating the length numbers that you have
14 here, you mentioned that you filtered out state barriers so that
15 you would not double count; is that correct?

16 A Right.

17 Q But you did not filter out the non-state barriers; is that
18 correct?

19 A I did not include non-state barriers.

20 MR. TOMISSER: Thank you.

21 THE COURT: Thank you, Mr. Waldo.

22 The plaintiffs may call the next witness.

23 MR. MORISSET: I am also responsible for the next
24 witness. May I have a few minutes to gather my papers?

25 THE COURT: Certainly.

1 MR. MORISSET: May it please the Court, Mason Morisset
2 in the for the Tulalip Tribes. Our next witness will be
3 economist Phil Meyer. We have the same situation here in terms
4 of an original declaration, which we've labeled...

5 THE COURT: AT-005?

6 MR. MORISSET: I think that's correct, your Honor, yes.
7 And now A and B also. A for the original and B for the revised
8 version.

9 And we'd like to offer -- make an offer of proof for the
10 first version, 005(a), for purposes of perpetuating that record
11 at this time.

12 THE COURT: All right.

13 MR. TOMISSER: No objection for that purpose, your
14 Honor.

15 THE COURT: Thank you.

16 MR. MORISSET: And then if the Attorney General has
17 anything to discuss as to the redacted version, we'll put
18 Mr. Meyer on the stand to explain that.

19 THE COURT: Mr. Meyer, let me have you step forward to
20 be sworn in.

21 Whereupon,

22 PHILIP MEYER

23 Called as a witness, having been first duly sworn, was examined
24 and testified as follows:

25 THE CLERK: Will you please state your full name and

1 spell your last name for the record.

2 THE WITNESS: Philip A. Meyer, M-E-Y-E-R.

3 THE COURT: Mr. Meyer, good morning. There's water on
4 your left if you should need it. All right?

5 Mr. Morisset, for our record, the only exhibit that's in at
6 this point in time is his resume. That's 005-1. All of the
7 other ones, my records show, are not admitted at this point in
8 time.

9 MR. MORISSET: That's what I understand. Now I'm not
10 sure, before we start, if I cut off defense counsel who might
11 want to say something about where we are before we start.

12 THE COURT: Right. Let me check with the State to see
13 if they still maintain objections to any or all of -- let me know
14 if you maintain objections or are withdrawing your objections to
15 anything.

16 MR. TOMISSER: With regard to the original declaration
17 of Mr. Meyer, your Honor, the State would stand on its objection
18 that it's been excluded in its entirety on the order in limine.
19 With that caveat, we don't have an objection to what is now
20 offered as the revised declaration of Mr. Meyer.

21 THE COURT: So 005-B?

22 MR. TOMISSER: Yes.

23 THE COURT: All right. That will be admitted.

24 DIRECT EXAMINATION

25 By Mr. Morisset:

- 1 Q All right. In that case, I will just briefly run through it.
- 2 Mr. Meyer, do you have 005-B in front of you?
- 3 A Yes, I do.
- 4 Q And do you have the pleading paper attached to it with your
- 5 signature and a date of October 13th?
- 6 A No, I don't.
- 7 Q Well, is the report you have in front of you the final report
- 8 that you approved on approximately the 13th?
- 9 A Yes.
- 10 Q And would -- if you were giving live testimony today, would
- 11 that be your direct testimony?
- 12 A Yes.
- 13 Q Now, would you explain just briefly that after the Court's
- 14 ruling as to what portions of your testimony needed to be --
- 15 original testimony needed to be excluded, will you just briefly
- 16 indicate what you did on this revised report?
- 17 A Basically I removed any of the calculations and conclusions
- 18 associated with production numbers of adult salmon and their
- 19 distribution to various fisheries that had been earlier supplied
- 20 to me.
- 21 Q And then that left what as to the remainder of your report?
- 22 A Well, I should have said that I also removed a section that
- 23 has to do with what is described as existence or non-use values.
- 24 Because what I was asked to do in the remainder of this report
- 25 was simply deal with the value of a salmon or a Steelhead, not go

1 beyond a single adult fish.

2 At that marginal scale, talking about existing values,
3 existence values doesn't make any sense, so I removed that
4 section completely. And so what I did, in essence, was I reduced
5 summary tables that talked about the commercial -- the value for
6 commercial catchers and processors of a single salmon, or in the
7 tribal case, Steelhead, and the value for recreational fishermen
8 of a catch of a single salmon or Steelhead.

9 Q If you would, please, turn to Table 1 in your revised report.

10 A I have it.

11 Q And what's the label on that, please?

12 A It says, "Net Economic Value Coefficients for Commercial
13 Fisheries and Processing, Added Harvest of Salmon and Steelhead."

14 Q And, briefly, what does that indicate and how did you arrive
15 at those numbers?

16 A Basically it is simply a factor table which identifies the
17 percent of value that is described as net economic value as
18 opposed to gross value received by fishermen, and then similarly
19 by persons who were processing that fish.

20 And by "net economic value," I simply mean gross value minus
21 the costs of fishing and/or processing.

22 Q And would you go to the next table, please, and indicate what
23 table that is on?

24 A Table 2 on Page 4.

25 Q And what is that table?

1 A That table basically takes the average harvest price for each
2 -- commercial harvest price for each species of commercial salmon
3 and Steelhead and then applies the factors developed in Table 3
4 to it to obtain a net economic value per salmonid for fishing and
5 processing.

6 In essence, that's the final result of my calculation with
7 respect to commercial fishing and processing activity.

8 Q All right. And would you proceed to the next table and page
9 number, please?

10 A That's Table 3 on Page 6.

11 Q And explain what that is and how you derived those numbers.

12 A That table presents the net economic value per salmonid for
13 salmon and for Steelhead -- for a salmon or a Steelhead caught in
14 sport fisheries. And the way I obtained that was to first
15 develop a value of, I believe it was \$58 per recreational fishing
16 day. And then I needed to get from a recreational -- the value
17 per recreational fishing day to the value per recreational fish.
18 And to do that, I took data from the U.S. Fish and Wildlife
19 Service and from the Washington Department of Fish and Wildlife.

20 And what I did in that data was divide the total number of
21 fishing days -- sport fishing days reported by the total number
22 of sport fish caught reported, and that gave me the number of
23 days per salmon caught. And I multiplied that by the \$58 to get
24 the numbers that are presented in Table 3.

25 Q And what was the source of the data you used to get that

1 per-fish value?

2 A The \$58 per angler day came from a study by TCW Economics
3 published in 2008 for the Washington Department of Fish and
4 Wildlife. That TCW Economics report also provided in its table
5 recreation salmon and Steelhead harvest figures for Washington,
6 and it is Table 6. The -- pardon me. I misspoke.

7 The TCW report in its Table 8 provided aggregate net economic
8 value figures for salmon and Steelhead in the state of
9 Washington. Table 6 provided recreational Steelhead and salmon
10 harvest figures for the state of Washington. That was the
11 division that I described.

12 MR. MORISSET: I have no further direct, your Honor.

13 THE COURT: Thank you. Cross-examination.

14 CROSS-EXAMINATION

15 By Mr. Tomisser:

16 Q Good morning, Mr. Meyer.

17 A Good morning.

18 Q In your report, I want to be clear, when you refer to net
19 economic value to Washington, as it's phrased in your report,
20 that is a reflection of net economic value -- or economic
21 activity in the state, not a revenue stream to the Department of
22 Revenue of the state of Washington, correct?

23 A That is correct.

24 Q In the table that you have there, it represents the price of
25 various fish in the state. Is it correct that those prices

1 fluctuate over time?

2 A Yes, they do.

3 Q And Table 3 in your chart -- in your report, I'm sorry, on
4 Page 6, you say, "This is an effort on a daily basis," is how
5 that is calculated; is that right?

6 Explain what you mean. You said it's based on effort to
7 catch a fish. As I understand it, the way that works out is how
8 many days essentially to catch one fish; is that right?

9 A No.

10 Q Okay. Please explain how that calculation works.

11 A I started with a value for a recreational day of fishing.
12 And I needed to get from a value per day to a value per fish. To
13 make that calculation, I needed to know how many days it takes to
14 catch a fish. And so I went to data in Wegge, TCW Economics - if
15 I said Wegge, that's what I mean - which gave me aggregate net
16 economic value and the number of days to get there. And by
17 dividing the one to the other -- pardon me. Aggregate harvest
18 and the number of days to get there. And that gave me data on
19 how many days it takes to catch a fish. And when I do that, then
20 I could multiply it by the value per day to the value per fish.

21 Q And when we look at the value involved in a day's effort to
22 catch a fish, does that include all the cost that it takes to do
23 that; in other words, the gear that you're going to use, the
24 fuel, the transportation, maybe lodging, all of those things, is
25 that what you are talking about when you talk about aggregate

1 value, are those sorts of items?

2 A No.

3 Q What are you talking about?

4 A Typically net economic value, the term subtracts out
5 associated costs and refers to what economists describe as the
6 consumer surplus, which is the surplus in benefit or value left
7 after you've spent whatever you need to spend to go catching the
8 fish.

9 Q The numbers presented in both -- well, in Table 3, for
10 example, this is based on a statewide amount, correct?

11 A Statewide average.

12 Q Do you happen to know what the percentage is for contribution
13 to that from Columbia River fishing?

14 A No.

15 Q Do you know what the percentage attributable to fishing in
16 eastern Washington might be?

17 A I would have to go and look at the data. I seem to recall
18 that eastern Washington may -- I believe the term of art that was
19 used was -- well, they were talking about salmon, so basically
20 the first qualifier would be that they weren't talking about
21 other species of fish other than salmon and Steelhead. But I
22 would have to go back and look at the tables to answer that
23 accurately.

24 Q And if we look at fishing activity within the case area, is
25 it also your understanding from looking at the data that is

1 collected that the Lake Washington Sockeye fisheries, when it is
2 open, has a much lower number, in terms of the days of effort to
3 catch a fish on that fishery?

4 A That's being argued by a state witness. I don't have any
5 direct knowledge that that is correct.

6 Q You also mentioned in your direct testimony, I believe,
7 Mr. Meyer, that you had removed your previous analysis on the
8 contingent value methodology, correct?

9 A I removed my previous analysis on existence or non-use
10 values.

11 Q Although you still reference some of that material in your
12 direct report on -- for example, on Page 1 and again on Page 5
13 with your reference to the Loomis study, correct?

14 A Just bear with me for a second. My Page 5 reference to
15 Loomis has to do with benefit transfer methodology, not with
16 contingent valuation. You are correct that I make a kind of
17 baseline statement in Section 1 on Page 1 before I go into my
18 marginal analysis.

19 Q When we talk about contingent value studies and benefit
20 transfer analysis, this is an economic practice where we look at
21 ways to measure things that people value, such as the value of
22 having cleaner water or cleaner air, an improved natural
23 resource, preserving the scenic vista, are all things that might
24 be the subject of a contingent value study or a benefit transfer
25 analysis; is that right?

1 A That's two questions. And the answer to both is yes.

2 Q Thank you. In conducting these sorts of studies, I
3 understand that they are based around carefully designed surveys
4 in order to elicit responses from the public in terms of what
5 they might be willing to pay to either improve a resource or to
6 preserve a resource?

7 A Are you talking about contingent valuation now?

8 Q Yes.

9 A Many such studies are.

10 Q And then the distinction that we're making here between a
11 contingent value study and a benefit transfer analysis study is
12 that the benefit transfer analysis, what that does is it reviews
13 contingent value surveys that have already been done, takes those
14 values, when appropriate, and transfers them to a new case study
15 situation, correct?

16 A Contingent valuation studies would be some of the studies
17 that would be reviewed if one were looking to use a transfer -- a
18 benefit transfer methodology.

19 Q And in this particular case that we have here, this
20 sub-proceeding, there was no study done in order to do a
21 contingent value study, correct?

22 A No study done by me?

23 Q There was no study done by you?

24 A That's correct.

25 Q In your report, I believe on Page 5, you state that given the

1 time and resources available that a benefit transfer analysis was
2 employed here. And I assume that that is as opposed to having
3 done a contingent value study, correct?

4 A That's almost correct. You continue to use the term
5 "contingent valuation" as if that's the only way to do that kind
6 of a study. There are other methods. But taking that as -- with
7 that qualification, my answer is yes.

8 Q And, in fact, you have assisted in performing contingent
9 value studies on previous occasions in other situations, is that
10 right, at least on one occasion that I'm aware of?

11 A I've done them and I've assisted. "Assisted" might be a word
12 that we need to discuss. I'm not quite sure how that applies.

13 Q There can be varying levels of assistance on a project, I
14 assume?

15 A I'm still not sure.

16 Q Well, you provided enough assistance to Mr. Loomis to have
17 him thank you when the final report came out on the --

18 A Yes. I was the chair of a human effects working group
19 established by the National Park Service, the U.S. Bureau of
20 Reclamation, the Washington Department of Fish and Wildlife, and
21 the Lower Elwha S'Klallam, at that time, Tribe, as I remember.

22 And as chair of that committee, there were various studies,
23 economic, anthropologic costs, as I remember them, that were
24 under the general direction of my committee. And Dr. Loomis's
25 study on the Lower Elwha, short term, I can call it existent

1 values, was one of those studies.

2 Q That particular study that you mentioned there by Dr. Loomis,
3 about how long did it take to do the study; in other words,
4 generate the questions, send out the survey, get the data back,
5 and then come to conclusions?

6 A If I said about a year, I think that would be close.

7 Q So about a year to conduct that particular survey. And that
8 was one that involved salmon -- recovery of salmon, correct?

9 A Yes.

10 Q And so you're aware, Mr. Meyer, that this sub-proceeding has
11 now been in existence for about eight years?

12 A I'll accept that. I don't know.

13 Q So I'm wondering, then, Mr. Meyer, about your statement in
14 your report that there was not enough time to do a contingent
15 value study in this case. Eight years would be plenty of time to
16 do a contingent value study if somebody wanted to do one, isn't
17 it?

18 A It certainly would if the economist was contacted and
19 retained at a sufficient period, yes.

20 Q In fact, the practice of doing contingent value studies has
21 been around since at least the early to mid '90s, correct?

22 A Well before that.

23 Q And when you do a contingent value survey, and you do one
24 honestly, you don't know the answer to the survey before you send
25 it out, do you?

1 A No.

2 Q So to do a contingent value survey in the course of
3 litigation would be risky, wouldn't it, because you don't know
4 what the answer's going to be?

5 A I think the social scientist is going to simply -- would
6 simply respond: The answer's going to be what the answer is. I
7 don't know that risk comes into it, or I don't know how you're
8 defining "risk."

9 Q Well, one of the ways that you could control for risk,
10 Mr. Meyer, is rather than doing the contingent value study and
11 asking the questions directly about the case, would be to do a
12 benefit transfer analysis, perform a review of the literature
13 that has been done, and then find one that worked for you,
14 correct?

15 A If that's a hypothetical, I don't believe that any competent
16 economist would do that.

17 Q Well, in this particular case, Mr. Meyer, let me ask you
18 about the benefit transfer analysis that you have proposed to the
19 Court. And before we get into the specifics of that, I'd like to
20 talk about a couple of general points when you're considering
21 doing the benefits transfer analysis.

22 Is it correct that as you're approaching the benefits
23 transfer analysis, one of the things that you would be concerned
24 about is the quality of the underlying contingent value study
25 that you may be using?

1 THE WITNESS: Could I ask for a clarification?

2 THE COURT: You may.

3 THE WITNESS: Are you cross-examining me on my original
4 report or are you cross-examining me on the report that's been
5 accepted today?

6 The Loomis work was in the original report and was not in
7 this report.

8 By Mr. Tomisser:

9 Q And it's also referenced in the report that you filed
10 yesterday. In fact, it's still recommended for the Court to
11 review it.

12 MR. MORISSET: May we have a minute to have a colloquy
13 here?

14 THE COURT: Actually, this is probably a perfect time
15 for our morning break.

16 (At this time, a short break was taken.)

17 THE COURT: Counsel, we are back in session. Were we
18 able to resolve what's going on with these two versions of the
19 declaration, Mr. Tomisser?

20 MR. TOMISSER: We have not only resolved that, your
21 Honor, we have gone further and resolved any need for me to
22 continue my cross.

23 THE COURT: Maybe we should take more breaks, then.
24 Thank you.

25 Any redirect?

1 MR. TOMISSER: Well, wait a minute, but let me tell you
2 what we did. A newly admitted exhibit from Mr. Meyer, your
3 Honor, during the break, Counsel -- Mr. Morisset and I have
4 agreed that the second paragraph on the first page that has the
5 reference to the Loomis study, that that paragraph can be
6 stricken from the report.

7 Once that is stricken, then I don't need to go any further
8 with that portion of the cross. And what we will do to assist
9 the clerk, I hope, is that we will, sometime today, get a
10 redacted version that takes that paragraph out and then give this
11 a new exhibit number, and that will hopefully be the final
12 exhibit for Mr. Meyer.

13 THE COURT: That will help us a lot. Thank you.

14 All right. Mr. Morisset, any redirect?

15 MR. MORISSET: Just briefly, your Honor.

16 I just want to confirm or ask whether we did admit AT-005-1,
17 which is the resume.

18 THE COURT: Yes.

19 MR. MORISSET: We did do that. All right.

20 REDIRECT EXAMINATION

21 By Mr. Morisset:

22 Q And if I may ask a question, do you have that in front of
23 you, Mr. Meyer?

24 A No, I don't.

25 Q You do recall it generally?

1 A Yes.

2 Q Is it up-to-date, as far as your current activities as an
3 economist?

4 A Yes.

5 MR. MORISSET: And I'm sorry, but I think Mr. Tomisser
6 indicated we will be submitting a revised exhibit, your Honor.
7 So we agree on that.

8 Well, I guess that completes my examination of Mr. Meyer. I
9 have a couple of other housekeeping things I want to discuss.

10 THE COURT: Thank you.

11 Mr. Meyer, thank you. You may step down.

12 MR. MORISSET: Your Honor, before it gets lost in the
13 fog of trial, as we say, plaintiffs want to be clear that we
14 still have a number of exhibits that we need to deal with before
15 we rest our case. And we will continue our discussions with
16 defense counsel and try to have those lined up for discussion as
17 soon as possible.

18 There's still a number of exhibits that may not have been
19 alluded to with witnesses that we need to discuss with defense
20 counsel.

21 Second, I do want to be clear, I will move now to introduce
22 as an offer of proof Exhibits AT-006, AT-006-1 through 11. Those
23 are things that deal with Mr. Rankis, who has been withdrawn
24 pursuant to your Honor's order, but they relate to information --
25 or work done by Mr. Waldo and will be kind of free floating as to

1 the original presentations, if not included in the offer of
2 proof, not for evidence before the Court.

3 And then also AT-211, which falls into the same category.
4 And, again, these are just for the offer of proof. AT-211 is a
5 spreadsheet which was also subject to the Daubert Motion on which
6 you ruled that it should be excluded. So those should, in
7 effect, go along with the offer of proof of Mr. Waldo's original
8 testimony, and I would so move.

9 MR. TOMISSER: On the limited basis this is being
10 offered here, your Honor, there's no objection for them being
11 offered as an offer of proof.

12 THE COURT: It is understood that the Court's ruling
13 basically kept these out. So AT-006 through AT-006-11 are part
14 of that offer of proof, as well as AT-211, which is a spreadsheet
15 labeled "Lake Washington Sockeye Data. Sockeye Harvest
16 Calculations for Directed Fishery Years and Non-Directed Fishery
17 Years," and it is dated 7/31/2009.

18 Mr. Morisset, regarding the exhibits, that's of course not
19 final. I understand that, giving the timing of the preparation
20 of the numerous exhibits and the Court's ruling on the motions
21 in limine, that that makes it a little difficult to sort all this
22 out. So, yes, you will also have the opportunity to go ahead and
23 make sure that whatever exhibits you are proposing have been
24 dealt with, and don't worry about the timing of it so much.

25 MR. MORISSET: Thank you, your Honor. That completes my

1 examination of Mr. Meyer.

2 THE COURT: Any other witnesses, then, on behalf of the
3 plaintiffs?

4 MR. MORISSET: Yes. I believe they've arrived. We
5 apologize for sometimes being a little slow, because we've got
6 people travelling from all over. I'll let Mr. Raas make excuses
7 if he has to.

8 MR. RAAS: Thank you, your Honor. I'm Daniel Raas. I
9 am co-counsel for the Lummi Nation.

10 The plaintiffs would next call Mr. Randy Kinley to the stand.

11 THE COURT: Good morning. Let me have you raise your
12 right hand and be sworn, please.

13 Whereupon,

14 RANDOLPH KINLEY

15 Called as a witness, having been first duly sworn, was examined
16 and testified as follows:

17 THE CLERK: Will you please state your full name and
18 spell your last name for the record?

19 THE WITNESS: My indian name is Paquasut,
20 P-A-Q-U-A-S-U-T. My Christian name is Randolph James Kinley,
21 Senior.

22 THE COURT: Can you spell your last name for us?

23 THE WITNESS: K-I-N-L-E-Y.

24 THE COURT: Thank you, Mr. Kinley.

25 MR. RAAS: Your Honor, I'd like to beg the Court's

1 indulgence if we run a little late for the noon break.

2 Mr. Kinley has responsibilities back at the reservation to cook
3 some fish for a visiting delegation from the Obama
4 administration.

5 THE COURT: We'll try to get him done.

6 DIRECT EXAMINATION

7 By Mr. Raas:

8 Q Could you state your age, please, Randy?

9 A I'm 58.

10 Q And where do you live?

11 A I live on the Lummi Nation Reservation.

12 Q And where did you grow up?

13 A On the reservation.

14 Q Have you been away from the reservation for any length of
15 time?

16 A No.

17 Q And what tribe are you a member of?

18 A I'm an enrolled member of the Lummi Nation, but I am a
19 descendent of some other tribes.

20 Q We'll get to that. And do you count among your ancestors
21 individuals who signed the treaty?

22 A Can I count them up?

23 Q Are there such?

24 A Yes, there is.

25 Q And you've mentioned that you are also descending from people

1 who were members of other tribes or belong to other groups.

2 Which groups are those?

3 A On my grandfather's side, I'm descendent of the S'Klallams,
4 the Duwamish. On my grandfather's side, I'm part of the Cowichan
5 and Samish. I'm also part of the Semiahmoo band.

6 Q And the Semiahmoo band is located?

7 A Just north of the U.S. border.

8 Q And have you testified in the United States versus Washington
9 before?

10 A No. I was in the Rafeedie Decision.

11 Okay, they're both the same. Yeah. Sorry, your Honor.

12 Q You testified in the shellfish case?

13 A Yes.

14 Q And have you had relatives testify in the United States
15 versus Washington?

16 A Yes. My uncle was very paramount in the decision.

17 Q The original decision with Boldt?

18 A Yes.

19 Q And that uncle was?

20 A Forrest Kinley; Dutch.

21 Q Now, how long have you been fishing?

22 A Since I was about four years old.

23 Q So that's 54 years?

24 A 54 years.

25 Q And how did you learn how to fish?

1 A In the river, my mom taught me. In the marine water, my
2 father taught me.

3 Q How extensive has your fishing career been?

4 A When it was sustainable, I used to make my livelihood out of
5 fishing year round.

6 Q You said you started in the river. Which river is that?

7 A The Nooksack.

8 Q What kind of fishing did you do there?

9 A We would start in the spring and fish clear until February,
10 March.

11 Q What species were there?

12 A All species except for Sockeye.

13 Q Now, we're talking about all species of salmon, right?

14 A Yes.

15 Q Including Steelhead?

16 A Yes.

17 Q And then when you moved out of the river, where did you fish?

18 A I fished from the Canadian borders -- well, it started before
19 U.S. versus Washington. I fished in southeast Alaska, I fished
20 in California, and I fished in Oregon. That was before Boldt.

21 And then after Boldt, we fished from the Canadian border to
22 the waters of Seattle.

23 Q And what species did you fish for?

24 A I fished for salmon within -- shellfish. And then I traveled
25 to Alaska. I fished halibut and crab. And I fished herring in

1 San Francisco, and I fished crab on the Columbia River.

2 Q Excluding shellfish, did you fish other species other than
3 salmon in the case area?

4 A Yes.

5 Q And what were those?

6 A They were all Coho, Chinook, Chums.

7 Q Did you fish halibut?

8 A Yes.

9 Q Would you say that the way you learned how to fish is typical
10 of how Lummis and other Indians learned how to fish?

11 A Yes, I would agree with that.

12 Q Well, first of all, do you earn your living by fishing today?

13 A No.

14 Q And why don't you?

15 A Because of the diminished resources, and the opportunity on
16 the water is not there like it used to be.

17 Q So fewer fish?

18 A Yes.

19 Q So there are fewer fish than, say, the 1980s?

20 A Definitely.

21 Q 1990s?

22 A Definitely.

23 Q And what effect has this had on the Lummi fleet?

24 A I don't know how you put it into terminology other than it's
25 been so devastating to our people culturally. And then you have

1 to put the quantifier, like I heard the gentleman talking before,
2 economically, that there's no value that you can put to our
3 social impacts to our people because of our traditions, the way
4 we do our businesses and stuff.

5 Q Is there fishing knowledge being lost?

6 A Definitely, because of the time and the lack on the water.

7 Q What do you mean by "time and lack on the water"?

8 A Because our knowledge is not written and scripted by books
9 like the Caucasians. Ours is traditionally oral. And because
10 we're not on the water, the way I was taught through my dad,
11 sitting there watching and listening, I can't pass that on, my
12 teachings that I've learned to my siblings, because I'm not on
13 the water as much as I used to be.

14 Q Do you have children?

15 A Oh, yes, I do. I got four beautiful daughters, two sons, and
16 I got 28 grandkids and one great granddaughter.

17 Q And you're young yet.

18 A I know. That's why my hair's like this.

19 Q Are any of your sons or daughters fishers?

20 A Yes. I got two sons that are commercial. One's a diver,
21 crabs. And my daughters, they dig clams. It's something I
22 wouldn't do, though.

23 Q Why not?

24 A It's too hard on the back.

25 Q When you're fishing, you fished Sockeye salmon?

1 A Yes, I have.

2 Q And where did you do that?

3 A In Alaska in '73, I fished in our usual and accustomed areas,
4 from Point Roberts down to the Salmon Banks.

5 Q And that's in the San Juans?

6 A Yes.

7 Q Where are those Sockeyes from, what river system?

8 A The biggest portion are coming from the Fraser.

9 Q Is there a few from other places?

10 A Yeah. There's a minute. But the way the management is
11 structured is that we don't want to have impacts on Lake
12 Washington and Baker Lake because of the status of those stocks.

13 Q And Baker Lake is part of the Skagit system?

14 A Yes.

15 Q And are there any other species that impact your ability to
16 fish the Fraser River?

17 A Yes, there is. There's Chinook and Coho.

18 Q And where did the Chinook come from?

19 A From the Fraser.

20 And we have Washington State listed species that have the big
21 impact on our fisheries.

22 Q And how do they impact your fishery?

23 A Based upon the timing and migration and the process that's
24 developed cooperatively with the State, there's X amount of
25 Chinook that are indirectly taken during incidental fisheries.

1 The Lummi never had a directed fishery since 1978, which we took
2 upon ourselves to close our fishery down because of the status of
3 the Chinook.

4 But we go through this process, as you heard the other
5 witnesses talk about, the North of Falcon process, that divides
6 literally, sorry to say, the last fish, so somebody has the
7 ability to go out and practice their way of -- quality of life,
8 which is the tribes.

9 Q So as not to take the last fish, your fishing of the Sockeye
10 are limited?

11 A You bet.

12 Q Then you also used to fish Pink salmon?

13 A On an odd year.

14 Q Because that's when they run, is --

15 A Yes.

16 Q And where are the majority of the fish from?

17 A Fraser.

18 Q And there are other domestic runs?

19 A Yes. Back when I was growing up, the Nooksack had a heck of
20 a run. We've had some problems of escapement and stuff, and
21 survival.

22 Q And is the Pink salmon fishery impacted by other species?

23 A Yes.

24 Q Which species?

25 A Coho, and Chinook also.

1 Q And where are the Coho from?

2 A Fraser.

3 And I apologize, too. There's another one being listed too
4 that's impacting our fisheries, too, and it's the Steelhead now.

5 Q And those are -- where are the Steelhead from?

6 A It doesn't make no difference. They're listed through the
7 whole state of Washington.

8 Q They're Washington run Steelhead?

9 A Yeah.

10 Q And the Coho are in the Fraser and where else? Are there
11 domestic runs?

12 A They're more in the Fraser than anyplace.

13 Q And speaking of Coho, you used to fish Coho?

14 A Yes. Our neck of the woods was one of the largest terminal
15 area fisheries that we had, that we managed with the State of
16 Washington, which is 7B and C.

17 Q And where are 7B and C?

18 A Bellingham Bay and Samish Bay.

19 Q So that's close to home?

20 A Yes.

21 Q And those fish are all from which rivers?

22 A The Nooksack and the Samish.

23 Q Are there as many of those there as there used to be?

24 A No.

25 Q And Chinook, you used to harvest?

1 A Yes.

2 Q And where did you harvest those?

3 A We had directed Chinook fisheries in the same areas. And
4 sometimes we had opportunities outside in 7A and 7 because the
5 Fraser stocks were okay.

6 Q And 7A is --

7 A Point Roberts.

8 Q And 7?

9 A Down towards the islands.

10 Q The San Juan Islands?

11 A Yes.

12 Q And there obviously aren't as many Chinook as there used to
13 be?

14 A Definitely.

15 Q Now, you do have a Chinook fishery in 7C, do you not?

16 A Yes. That's a terminal fishery.

17 Q And where are those fish from?

18 A Samish and Kendall and Lummi hatcheries.

19 Q So those are all hatchery fish?

20 A Yes, the majority of them, 95 percent of them.

21 Q Are the hatchery fish influenced by -- your ability to catch
22 hatchery fish influenced by the wild fish?

23 A You bet.

24 Q And how is that?

25 A Because of the listing and -- I'm not an expert, because the

1 way I understand things, hatchery fish is being treated, I
2 believe, biologically as important as a wild fish. That hampers
3 our ability to take as much as we used to.

4 Q Is that because you can't differentiate in your nets
5 between --

6 A Yes. We don't have a selected methodology to fish, to
7 harvest.

8 Q Throughout your life, how did you learn about the place of
9 fish in the Lummi culture?

10 A By sitting down and listening, talking to our people. Lummi
11 is so unique. We are probably the largest fishing tribe. That's
12 nothing to brag about. All the tribes are great fishing. They
13 tried to make us farmers, but we're farmers of the sea. That's
14 from the bottom of the south to the north where we're at.

15 I mean, it's something that -- I hate to say bred into us,
16 but because of our -- where the federal government put us, we had
17 to learn to live off. And like I says, we're not a potato or a
18 corn planter. We're fishermen. And it's our elders and it's
19 oral tradition that's passed down to us how we learn to do what
20 we do.

21 Q Now, the tribe celebrates first salmon ceremony?

22 A Yes, we do.

23 Q And when is that?

24 A We have turn around. In western civilization's language, we
25 annualize it to May 17th every year.

1 Q And where has that been celebrated recently?

2 A When we first started, we started it on the beach, and then
3 it grew. We moved it up to our community building. And because
4 of the way we've been taught, we moved it into our school now.
5 And so the last year -- which was so great that the school held
6 it. Because of the way we were taught, it's through oral. And
7 we bring our kids into the festivities to make sure that they
8 understand all that stuff and why we do it.

9 Q And who else is invited to that ceremony?

10 A We reach out to all the communities. Our friends that are
11 sitting at the table, we invite them; we invite the federals; we
12 invite different municipalities; we invite the county. You name
13 it. We invite everybody, because this is the beginning of our
14 harvest season for us, and we want to share it with as many
15 people that will sit down with us and break bread.

16 Q And salmon are served, right?

17 A It's the number one.

18 Q And what species are we talking about?

19 A Chinook.

20 Q So these are spring Chinook?

21 A Yes.

22 Q Are spring Chinook plentiful?

23 A No.

24 Q These are fresh caught?

25 A Yes.

1 Q And do you have enough fish all the time to feed the people?

2 A No.

3 Q And what happens when you don't have enough locally caught
4 fish?

5 A We have to go ask some of our friends above the border, below
6 the border, and we'll sit down and we'll trade shellfish with
7 them to acquire salmon. And if it comes to the seriousness of
8 the situation, we'll send our guys out to buy fish from our
9 people in the straits, because they have a fishery going on out
10 there.

11 Q Is that the way it used to be?

12 A Never.

13 Q Now, since you're not a full-time fisher anymore -- You do
14 still fish, right?

15 A Yes, I do, when I have the ability, the time.

16 Q So you're employed?

17 A Yes.

18 Q And what's your current position?

19 A I work for the Lummi Natural Resources Division. I am an ESA
20 policy representative.

21 Q And what does an ESA policy representative do? What do you
22 do as the ESA policy representative? I don't want to generalize
23 here.

24 A On the non-tribal side, I work with the state, federal, local
25 entities on salmon recovery. On the tribal side, I work with the

1 tribes trying to promote our salmon recovery plans.

2 Q And do you also work on the harvest side?

3 A Yes.

4 Q Now, there are a number of various groups that we've heard
5 about over the last couple of days. Let's talk about -- oh, I'm
6 sorry.

7 You said you worked with the state agencies as part of your
8 job?

9 A Yes.

10 Q And -- have you worked with state agencies for a while?

11 A Since I've been involved with this stuff for the last 30-some
12 years.

13 Q And has the interaction -- the quality of the interaction
14 with the state agencies changed?

15 A Dramatically changed.

16 Q How?

17 A Because of the situation of the resources, we came to the
18 point of fighting over the last fish instead of trying to
19 create -- support each other to create more fish. That causes
20 animosity between the user group, the non-tribal, commercial and
21 recreation versus us people, us Indian people.

22 Q And that's changed?

23 A Yes. It's kind of -- sorry to say it, once -- the mentality
24 is dang near close to the 70s.

25 Q It's back to close to the 70s?

1 A Yes.

2 Q And how would you describe the 70s?

3 A That's something I'd like to forget. We went through the
4 same things on the commercial side that Billy went through,
5 except for I wasn't in jail, but we were shot at, we were
6 threatened, with our boats blown up. But we were young and we
7 wouldn't take nothing, and so we had lots of confrontations.

8 We were even in federal court here, and we had to send
9 somebody to prison, sorry to say.

10 Q And what has changed the reaction of the state agencies?

11 A The political climate and the legal. I think the political
12 has caused so much controversy, because everybody is trying to
13 survive. And they're not sitting down and working in a
14 cooperative manner anymore. That's my belief.

15 Q What do you mean by the legal climate?

16 A The tribes have always been willing to sit and talk and try
17 to -- based upon our experience. And because of the financial
18 situation that we're in right now, spend our money wisely. We
19 would rather sit at the table and try to come up with a solution.

20 But that's not -- withstanding that, if we can't come to a
21 solution, that we're not scared of court, even though our
22 druthers would be to sit and resolve.

23 Q Let's talk about some of those forums, or fora, if that would
24 be proper, where that discussion takes place.

25 Firstly, there's the Northwest Indian Fisheries Comission.

1 A Yes.

2 Q You're familiar with that?

3 A Yes.

4 Q Do you hold an official position?

5 A I sit with my partners Elden Hillaire and Harlan James. The
6 three of us are tribal representatives.

7 Q For the Lummi Nation?

8 A Yes.

9 Q What is the Northwest Indian Fisheries Commission?

10 A There's a consortium that was created back in the '70s by
11 some very wise individuals at the time that laid out some ground
12 rules by the U.S. versus Washington that some of the smaller
13 tribes weren't organized.

14 Q And this is a tribal organization?

15 A Yes, it is.

16 Q And it meets to -- how often does it meet?

17 A Monthly.

18 Q And does it have a staff?

19 A Yes, it does.

20 Q Does it do any actual allocation of fish?

21 A No.

22 Q Or perform any salmon restoration activities?

23 A No.

24 Q In terms of dividing up the fish and perhaps doing some
25 restoration activities, there is the Pacific Salmon Commission.

1 Are you familiar with that?

2 A Yes, I am.

3 Q Have you had or do you have any official positions on that
4 commission?

5 A No, I don't have an official. But because of our status as
6 Lummi Nation and the largest fishing tribe, we're always
7 attending these meetings.

8 Q And what's the role of the commission overall?

9 A They go through the process of allocation, meeting the
10 objectives of the treaty language which states that the U.S.
11 share 16.5. Out of that 16.5, 11.5 of that is treaty share,
12 which means that the tribes have the largest vested interest in
13 this.

14 Q Let me back up a second. The first treaty, the Pacific
15 Salmon Treaty?

16 A Yes.

17 Q And that's between the U.S. and Canada?

18 A Yes.

19 Q When you were talking about percentages, you're talking about
20 a portion of the Pacific Salmon Treaty annex that --

21 A Fraser.

22 Q Fraser River. Sockeyes and Pinks?

23 A Yes.

24 Q And 11 and a half percent of the Fraser run is allocated to
25 the indian treaty share?

1 A Yes.

2 Q And you're involved in those discussions?

3 A Yes.

4 Q And there are other tribal members, not necessarily Lummi,
5 who are involved in other parts of the Pacific salmon --

6 A Yes, there is.

7 Q Now, were you here when Lorraine Loomis testified?

8 A Yes, I was.

9 Q And you heard her discussion about the North of Falcon
10 process?

11 A Yes, and I sympathize for her.

12 Q Do you have any similar position in the North of Falcon?

13 A Yes. We're there to promote Lummi's objectives.

14 Q So you are the Lummi Nation representative?

15 A Yes.

16 Q And did she more or less accurately describe what happens
17 there?

18 A Yes.

19 Q There are a number of state-created groups. I want to talk
20 about a couple. One is the -- I think I've got it right. The
21 Salmon Recovery Funding Board?

22 A SRF Board.

23 Q SRF Board. Do you hold any position on the SRF Board?

24 A No, I don't.

25 Q Is there an official tribal representative of the SRF Board?

1 A Yes, there is.

2 Q How many tribal representatives?

3 A One.

4 Q Out of how many?

5 A I don't know precisely. There's more of a majority of non
6 than there is tribal.

7 Q So it's at least three?

8 A Yes.

9 Q What does the SRF Board do?

10 A They allocate funds for projects, restoration, and
11 acquisition and other things, too. Salmon recovery. Fund salmon
12 recovery projects.

13 Q And have you attended their meetings?

14 A No, I haven't.

15 Q The other one is the Puget Sound Partnership. Can you tell
16 us what the Puget Sound Partnership is?

17 A It's a state agency that the governor created, I can't
18 remember how many years ago, to solve the problems in Puget
19 Sound, or clean up Puget Sound by 2020. And there was a law
20 created that established this new entity.

21 Q Called the partnership?

22 A Yes.

23 Q And do you have a role in that partnership?

24 A Yes. I'm not at the level as the partnership per se, but I
25 sit on the ECO board.

1 Q And what does the ECO board do?

2 A The ECO board sits down and discusses issues and projects and
3 tries to get into the weeds and make recommendations to the
4 partnership.

5 But I also have a responsibility to meet with our tribes in
6 the Northwest, because there's only three indian seats on that
7 table, which is comprised of, I think, about 25.

8 Q So you're one of three, and there's 25 members?

9 A Yes.

10 Q On the ECO board?

11 A Yes.

12 Q And what kinds of things does the ECO board recommend?

13 A It depends on what chair you're filling, because the builders
14 make requests to solve their problems, the enviros solve their
15 problems, the municipalities try to solve their problems, and
16 we're looking at trying to figure out, at least from the tribal
17 perspective, how do we turn around and prioritize out of all
18 these problems, because there's not enough funding to go around
19 to solve, you know, if everybody wants their pet project solved.

20 Q And where does the money come from?

21 A Part of it is funded from the feds. The partnership
22 evidently just got the status of a national sanctuary now, which
23 is going to give them a lot of resources coming in.

24 Q And the ECO board makes recommendations to the partnership as
25 a whole?

1 A Yes.

2 Q Now, the 25 members on the ECO board, do they all understand
3 the indian treaties?

4 A No.

5 Q What do you mean when you say "no"?

6 MR. TOMISSER: Your Honor, I'm going to object to lack
7 of foundation for him to testify on that.

8 THE COURT: The objection is sustained.

9 By Mr. Raas:

10 Q Does their lack of understanding of the indian treaties, as
11 you put it, cause difficulties for you?

12 A Yes.

13 MR. TOMISSER: I will object, your Honor, and move to
14 strike the answer.

15 THE COURT: The objection's sustained.

16 We don't know yet how he knows that they don't understand the
17 indian treaties.

18 MR. RAAS: Very well. Thank you, your Honor.

19 By Mr. Raas:

20 Q Why do you think that some of the individuals on the ECO
21 board don't understand the indian treaties?

22 A As you know, Ron Simms, who's the executive director of King
23 County, who is now back in DC, always tried to refresh the ECO
24 board members' mind that they should pay attention to what we're
25 saying.

1 Q When you say "we," who do you mean?

2 A The tribes. Because you look at the history of this stuff
3 where we're at today, the State hasn't had very many chalked-up
4 wins on their side to do the right thing. And when I say that,
5 we look at the history of the decisions, the tribes have more
6 favorable decisions in their favor on the environment, fish, and
7 stuff like that, and cleaning up, and doing the right thing.

8 And Ron kept trying to promote that, because we are very
9 adamant that getting into a state process does not belittle our
10 treaty right or the trust responsibility to the federal agencies.
11 We are willing to work within that arena, but make it very clear,
12 if they're not going to do what's right, we'll take it to the
13 next level to accomplish the task or the objectives of the
14 tribes.

15 Q So can you give me an example of that kind of problem that
16 you've seen?

17 A Last year -- I'm going to give you one specific to the
18 Nooksack. Last year we had a water quality problem, a
19 temperature. And we just about had to threaten somebody to --
20 and this was Ecology, so my good friend Jay Manning, to do the
21 right thing on water temperature in order to meet in-stream flows
22 at the time that the fish needed it, from what I understand,
23 since I'm not a technical expertise, but I know the principle of
24 the argument.

25 And we had to force -- literally threaten to just about get

1 to the front doors of the court before they would do the right
2 thing, protect the resources.

3 Q And the ECO board, if I understood your testimony, makes
4 recommendations to the partnership?

5 A Yes, it does.

6 Q And the partnership does what with those recommendations?

7 A They'll try to implement them as best way seen into what they
8 call the action agenda that has been passed.

9 Q And does that action agenda always work out?

10 A No.

11 Q And why not?

12 A Because it's such a political process.

13 Q And who's the final arbiter of that? Who makes the call?

14 A It ultimately comes down to who controls the checkbook.

15 Q And that is?

16 A I couldn't rightly tell you who that is at that level.

17 Q And the tribal interests, how are they treated by the ECO
18 board and eventually by the partnership?

19 A They treat us just like a stakeholder, which really upsets
20 us.

21 MR. RAAS: Thank you very much. I have no further
22 questions at this time.

23 THE COURT: Cross-examination of Mr. Kinley?

24 CROSS-EXAMINATION

25 By Mr. Tomisser:

1 Q Good morning, Mr. Kinley.

2 A Good morning, sir.

3 Q I wanted to ask you a little bit about the ECO board and your
4 testimony here that there are a variety of stakeholders that
5 participate on that board, correct?

6 A Yes.

7 Q And a lot of them have -- I think you phrased it as pet
8 issues, but issues that different members are concerned about
9 that they try to bring to the floor; is that correct?

10 A Yes.

11 Q And the board is then tasked with trying to prioritize those
12 and decide which ones should be done and in what order, correct?

13 A Yes. Make recommendations to the partnership.

14 Q But there's not enough funding to do everything that everyone
15 wants; is that correct?

16 A Yes.

17 Q And that kind of prioritization exists not just at the ECO
18 board but also within the Lummi Nation as well in terms of having
19 to prioritize limited dollars; is that correct?

20 MR. RAAS: Objection, your Honor. That's beyond the
21 scope of direct. And furthermore, there's no foundation that
22 Mr. Kinley knows what the process of the Lummi is.

23 THE COURT: The objection will be sustained.

24 By Mr. Tomisser:

25 Q Mr. Kinley, have you participated as a member of the Lummi

1 Tribal Council?

2 MR. RAAS: Objection. Beyond the scope.

3 THE COURT: Overruled.

4 THE WITNESS: Yes.

5 By Mr. Tomisser:

6 Q And what has been your activity in that capacity?

7 A My first tenure, I was just a junior councilman, and then I
8 got to the point where I was vice chairman of our tribe.

9 Q What did you do as vice chairman of the tribe?

10 A I tried to get our people to develop policy and protect our
11 treaty rights at the state, local, and then the chairman took on
12 the federal level.

13 Q As a council member and also then as a vice chair, as you
14 phrase it, did you also have to deal with issues of tribal
15 budget?

16 A As an officer, all I did is oversee the meetings, unless
17 there was something that had to be voted on, because we have
18 processes set up that deals with it. We have a Title 29, we have
19 a treasurer, we have budget officers, just like any other
20 government.

21 Q And you would oversee those other departments?

22 A No. We had a GM.

23 Q Is that general manager?

24 A Yeah.

25 Q And would the general manager then report to the council?

1 A Yes.

2 Q And when decisions would have to be made, would the general
3 manager make recommendations to the council?

4 A We have what we call commissions, boards, and committees that
5 would also go through the process and scrub and make sure that
6 they have the input and make recommendations to the GM to the
7 LIBC.

8 Q I'm sorry, that last acronym?

9 A Lummi Indian Business Council. Sorry.

10 Q And have you served on the Lummi Indian Business Council?

11 A You bet.

12 Q How long?

13 A I think I served three terms. Twelve years, nine years,
14 whatever it was.

15 Q What time period are we talking about?

16 A From the 80s until early '90s.

17 Q And what does the Lummi Indian Business Council do?

18 A They do whatever the people -- the majority of the time what
19 the people tell them to do.

20 Q And what are the sort of things that the people tell them to
21 do?

22 A Take care of our elders; take care of our school; take care
23 of our kids; our health; try to create economic development; and
24 fund basic our services: housing, health, and enforcement.

25 Q So providing social services, has that consistently been a

1 priority of the Lummi people, to the best of your memory?

2 A We have literally took some serious steps because we're in
3 what they call a -- there's a status of health. It's a limit on
4 death, or whatever you want to call it, because of the health
5 situation on the funding.

6 Q The problem is there's not enough funding to provide all the
7 social services to help --

8 A The status of healthcare.

9 Q There's not enough funding --

10 A Yeah.

11 Q -- to fund all the healthcare programs --

12 A Yes.

13 Q -- that the tribe would like to put in place; is that
14 correct?

15 A Yeah.

16 Q So those decisions have to then be prioritized, correct?

17 A They are self priority, I believe.

18 Q "Self priority" meaning those come first?

19 A No. If you get sick and you're just about dead, you go to
20 the emergency room, and they have to pay for it.

21 Q I also wanted to ask you about the --

22 THE COURT: Good thing we don't have that as a problem
23 nationally, right?

24 THE WITNESS: We can't be buried on Friday.

25 THE COURT: I'm sorry, Counsel.

1 MR. TOMISSER: Easier for you to make that point than
2 me.

3 By Mr. Tomisser:

4 Q In terms of tribal revenues, is it correct that the casino is
5 now the largest single source of revenue?

6 MR. RAAS: Objection. Both beyond the scope, and more
7 importantly there's no foundation that Mr. Kinley knows about the
8 operation of the casino or the present day funding since he's
9 been off the council since the early 90s.

10 MR. TOMISSER: He was a member of the Lummi Indian
11 Business Council, your Honor, which is the financial arm of the
12 tribe.

13 THE COURT: I guess the question I have is how is this
14 relevant to the issues we're looking at here?

15 MR. TOMISSER: I'm trying to establish, your Honor,
16 broadly, that the tribal organization operates with priorities in
17 much the same way that the State does. They have different
18 revenue sources, and then what they do with them.

19 THE COURT: I understand that.

20 By Mr. Tomisser:

21 Q Mr. Kinley, let me ask you about some of the fishery points
22 that you had talked about earlier with Mr. Raas. I think you
23 mentioned that in earlier years, the Lummi Nation would fish
24 Sockeye salmon; is that correct?

25 A Yes. His name is Raas.

1 Q Raas.

2 The Sockeye salmon are affected by a phenomenon known as the
3 northern diversion; is that correct?

4 A Yes.

5 Q And the northern diversion is a situation -- a marine
6 condition which forces the Sockeye run up the western side of the
7 island and away from the Lummi Nation; is that correct?

8 A No, because they still end up in the same place, which is in
9 the Point Roberts area, which is ours.

10 Q Do you recall telling me, Mr. Kinley, in your deposition,
11 that the northern diversion forces Sockeye away from the Lummi
12 Nation?

13 A No.

14 Q Let me see if I can refresh you on that.

15 A I think the definition you're looking at, too, it used to be
16 El Nino. The mouth of the Fraser is still right at Point
17 Roberts.

18 MR. RAAS: Your Honor, without a reference to the
19 deposition page and line number, I would move that question and
20 answer be stricken.

21 MR. TOMISSER: Well, I'm getting there, your Honor. I'm
22 just trying to find it on my note.

23 It is Page 33 of the deposition.

24 By Mr. Tomisser:

25 Q On Page 33, Line 3. Towards the very bottom of that page,

1 Line 21 and then 23?

2 A Yes.

3 Q You were asked in that situation whether or not the northern
4 diversion turned the salmon up the west side of the island; is
5 that correct?

6 MR. RAAS: Your Honor, if he's going to impeach him, may
7 we have the question and answers, please?

8 THE COURT: Yes.

9 By Mr. Tomisser:

10 Q Mr. Kinley, you were asked, were you not, at Line 21: "From
11 your view, how does the northern diversion affect the Lummi
12 Tribe's harvest?"

13 You answered: "Because they come up the northern end, we
14 don't get an opportunity because the late stocks nowadays are
15 stocks of concern. So when they come that way, the only time we
16 would ever get to harvest them is when they back off the Fraser
17 flats."

18 Did I read that correctly?

19 A Yeah.

20 Q The Lummi Indian Nation --

21 A It's Lummi.

22 Q I'm sorry. My pronunciations are not good with anyone.

23 The Lummi Tribe performed an assessment of the factors that
24 are impacting the decline of salmon for the tribe. Do you recall
25 that?

1 A I couldn't recall that.

2 Q Do you know a Mr. Kurt Russo?

3 A Oh, yeah.

4 Q And who is Mr. Russo?

5 A He was a consultant that was hired by the tribe in the latter
6 years. I think he works for the Kluckhohn Group in Bellingham.
7 Before that, he used to be -- this was back in the '70s. He used
8 to be an employee of the Nation.

9 Q And do you recall him producing a report called "The Lummi
10 Indian Tribe and the Life With Salmon"?

11 A No, I don't.

12 Q Do you think that if I showed you a copy of that report that
13 it might refresh your recollection?

14 A Probably.

15 Q That's the first page of a two-page summary.

16 Does that look familiar?

17 A Well, you can see how long ago it was, because the enrollment
18 was only 3,500. Now our tribe is dang near 5,000.

19 Q So the tribe has grown?

20 A Yeah.

21 Q My question for you, Mr. Kinley, though, was now that you've
22 had a chance to look at that, does that refresh your recollection
23 about this report from Mr. Russo?

24 A In the detail, I couldn't say yes or no.

25 Q Do you recall, Mr. Kinley, any analysis on behalf of the

1 Lummi Tribe talking about the decline of salmon available to the
2 tribe, attributing the decline to accelerated logging in the
3 headwaters of the Nooksack basin?

4 A Can you rephrase that again, please?

5 THE COURT: Hang on. There's actually two questions
6 that are combined, Counsel. Let's break them down. The first
7 question is: Do you recall any analysis on behalf of the Lummi
8 Tribe talking about the decline of salmon?

9 THE WITNESS: Not to my recollection.

10 By Mr. Tomisser:

11 Q Do you recall a report attributing the decline to accelerated
12 logging in the headwaters of the Nooksack Basin?

13 A I couldn't say yes or no. Because I never read one, that
14 doesn't mean it doesn't exist.

15 Q Aside from any report that somebody may have done, do you
16 believe that accelerated logging in the headwaters of the
17 Nooksack basin would be one of the reasons for declining salmon
18 available to the tribe?

19 MR. RAAS: Objection, your Honor. Lack of foundation
20 and beyond the scope.

21 MR. TOMISSER: The witness testified on direct that
22 there had --

23 THE COURT: Objection. The objection will be overruled.
24 He's asking for your opinion. Do you have an opinion?

25 THE WITNESS: I'm not an expert in habitat, but a layman

1 would say it's part of the problem, I guess I would say. But
2 like I says, I'm not an expert, our biologist or geomorphologist,
3 or whatever you call it. I'm just a fisherman.

4 MR. TOMISSER: Thank you, Mr. Kinley. We will let you
5 go cook your fish.

6 THE WITNESS: I appreciate that, sir.

7 THE COURT: Any redirect, Mr. Raas?

8 MR. RAAS: Yes, your Honor.

9 REDIRECT EXAMINATION

10 By Mr. Raas:

11 Q Now, Randy, when you were on the council, and to the best of
12 your knowledge since then, where do the treaty rights stand on
13 the LIBC priorities?

14 A When I was on the council, there was eight of us that were
15 fishermen -- nine of us that were fisherman of the 11. And that
16 was the priority. We were the ones that took on the IRS case.
17 We took on the reservation case. We took on Boldt 2 and 3 and
18 all them other treaty right impact cases. We took on the effect
19 of water into the treaty rights.

20 It was the highest principle that was taught to us, and we
21 would do whatever it took to solve the problem, which was
22 litigation if we couldn't work it out cooperatively.

23 Q And a question of geography. You said that, in answer to
24 Mr. Tomisser, Point Roberts was a place -- the mouth of the
25 Fraser. Is Point Roberts in the United States?

1 A Yes, it is.

2 Q And is that part of the usual and accustomed fishing areas of
3 the Lummi Nation?

4 A Yes, it is. We have camp sites up there.

5 Q Is that where a major reef net fishery was?

6 A Yes, at Chaltoneth, is the indian term. They assigned it
7 over, with the assistance of the State, to make it an exclusive
8 area so it wouldn't be disturbed up there.

9 Q And that happened recently, right?

10 A Yes, it has. The governor was there and everybody else was
11 up there within the last two years.

12 Q And that's preserved as an historical and cultural site?

13 A Yes, it has.

14 Q Now, Mr. Tomisser spent some time talking about stakeholders.

15 Is there a difference in your mind between treaty rights and
16 stakeholder status?

17 A Yes, there is, definitely.

18 Q Would you tell us what that is?

19 A The problem with the stakeholders and -- and that's no -- how
20 would you say it? I am trying to figure out the terminology,
21 where the treaty right is with the federal government. A
22 stakeholder might be a person from the county or a municipality
23 or Joe Blow off the street.

24 A treaty right is something that's guaranteed to us versus a
25 right that actually a state citizen holds. And that's what

1 irritates us as tribal people, that the people that were in
2 charge turned around and could have solved some of the
3 problems --

4 MR. TOMISSER: Your Honor, I will object as
5 nonresponsive.

6 THE COURT: Ask another question.

7 MR. RAAS: I think he's actually answered the question.

8 Thank you very much. I don't have anything further.

9 THE COURT: Mr. Kinley, thank you. You may step down.

10 Counsel, we're a couple of minutes before noon, but we will
11 go ahead and take our break here and start up, and try to have
12 everyone back by 1:20 again. Have a good lunch.

13 (At this time, a lunch break was taken.)

14 THE COURT: Are we ready for our next witness?

15 MR. NIELSEN: May it please the Court, Eric Nielsen for
16 the Quinault Indian Nation.

17 The plaintiffs would like to call Ed Johnstone.

18 THE COURT: Mr. Johnstone, good afternoon. If I could
19 have you raise your right hand, we will get you sworn in.

20 Whereupon,

21 EDWARD JOHNSTONE

22 Called as a witness, having been first duly sworn, was examined
23 and testified as follows:

24 THE CLERK: Please state your full name and spell your
25 last name for the record.

1 THE WITNESS: Edward Johnstone, J-O-H-N-S-T-O-N-E.

2 THE COURT: You may inquire, Counsel.

3 DIRECT EXAMINATION

4 By Mr. Nielsen:

5 Q Mr. Johnstone, where do you live?

6 A I live at Tahola, Washington, on the Quinault Indian
7 Reservation.

8 Q Where is the Quinault Indian Reservation located?

9 A It is just north of Grays Harbor in the mid Washington coast.

10 Q Are you an enrolled member of the Quinault?

11 A I am an enrolled member.

12 Q How old are you?

13 A I'm 56.

14 Q Are you a descendent of any of the signers of the treaties?

15 A Yes. My grandmother was from Hoh River, and our family on
16 the Hoh River side were the treaty signers.

17 Q And Mr. Johnstone, what do you do for a living?

18 A I'm a fisheries policy spokesperson for the Quinault Indian
19 Nation.

20 Q And can you briefly describe in general terms what that
21 means. What is your job? What do you do?

22 A Well, it generally means that anything that has to do with
23 policy in the fisheries arena, that's what I do. I work directly
24 with the fisheries division and handle any of the policy issues.

25 Q When you say you work directly with the fisheries division,

1 what is the fisheries division?

2 A It's the division for the Quinault Tribe that handles all the
3 activities surrounding compliance under U.S. v. Washington to
4 uphold our self-regulatory status. It's one of the true tribes
5 that came out of the Boldt Decision that's self-regulating.
6 There are criterion under the Boldt Decision that we adhere to.

7 So in order to have the harvest, you have to do certain
8 technical things. To be able to do that, you have to have law
9 enforcement, you have to have officers, Quinault tribal members
10 to enforce our fisheries regulations. Those are the areas that
11 we cover. We do other things because we have hatcheries, but
12 those are not specific requirements of the Boldt Decision.

13 Q Now, are you a member of any other tribal fishery
14 organization?

15 A I'm a member of the Northwest Indian Fish Commission. And
16 currently I am the treasurer.

17 Q Have you ever held any elected offices with the Quinault
18 Indian Nation?

19 A Yes, I have. I was a tribal councilman. I served two terms,
20 '95 to 2001.

21 Q Based on your position with the Quinault Indian Nation and as
22 an elected officer in the past, are you familiar with how many
23 people the tribe employs in its -- dealing with its salmon
24 fishery?

25 A Well, fishermen or -- we happen to have a seafood enterprise

1 that employs folks also.

2 Q Okay. And this division, this fisheries division, do you
3 know how many people --

4 A In the fisheries division, we have 30 full-time staff and 30
5 to 50 seasonal workers.

6 Q And what kinds of things do they do?

7 A Well, they collect data. In order to have a fishery, you
8 have to know about the particular stock that you're trying to
9 manage. So when you're talking about -- you would have to do
10 spawning ground surveys. And so that data gets collected and
11 compiled and works through our operational technical section.
12 And then that stuff moves up and goes to our lead biologist who
13 would then work and do the forecasting for that particular year
14 that goes into the management cycle year that would you use that
15 data in -- for instance, in the North of Falcon process, when
16 you're negotiating, you know, the season that is going to come
17 upon you. That's one area.

18 There are several areas in the cyclical nature of managing
19 these resources. It's the same, if you will, every year. You
20 have preseason forecasts. You go into the process where all of
21 that is compiled. It's compiled for Pacific Fisheries Management
22 Council area. It's compiled for the Pacific Salmon Treaty uses.
23 Those are used in model runs that assist us in looking at how
24 that stock gets back to its home stream.

25 Then you go into this negotiated process where you talk about

1 how is the co-managers of the State of Washington and the tribe
2 going to harvest that resource if there are harvestable fish.
3 And then you go into actual -- you know, you may have a treaty
4 troll fishery. And then later on in the fall, you'd have your
5 in-season fishery. So then you're actively managing the fishery.
6 And then you're doing post-season analysis. And the thing just
7 rolls. It's continual.

8 Q Now, as the policy representative, are you required to know
9 how many tribal members are engaged in the treaty fishery?

10 A I do know, because this is my life's work.

11 Q Okay. And do you know how many -- the kinds of species of
12 salmon that the Quinault treaty --

13 A Well, we do harvest -- or we do fish on your fall stocks of
14 Coho, Chinook, we get Chum salmon, and then later on, Steelhead,
15 spring Chinook, Sockeye, Quinault Sockeye, summer Steelhead, some
16 summer Coho. We do not have any Pink salmon.

17 Q Do you participate in the Quinault Tribal Treaty Fisheries --

18 A I certainly do. And if I weren't here, I'd be there doing my
19 one -- you know, my only opportunity, or the major opportunity,
20 is in the fall and it's in October. And for this week, I had to
21 forego my fishing opportunity. This is the time period that I
22 fish.

23 Q And how do you work that with your job?

24 A Well, under our governance, my tribal member hired fishermen
25 can fish for me while I'm at this kind of a meeting. Otherwise I

1 would be just be out of the fishing.

2 Q Now, are you familiar with the tribe's usual and accustomed
3 fishing areas?

4 A Yes, I am.

5 Q And can you briefly name the river systems that make up those
6 areas?

7 A From north to south, it's the Queets, the Raft, the Quinault,
8 the Moclips, the Kapallas.

9 Inside of Grays Harbor Bay, because they both flow into the
10 Grays Harbor Bay, is the Humptulips and the Chehalis. To the
11 south farther, it would be the Elk and the Johns. And inside the
12 tributaries of the Chehalis are the Satsup and the Wynoochee.

13 Q And do some Quinault members also fish in the ocean as well
14 for salmon?

15 A Yes. We have a treaty troll fishery.

16 Q And do some of the Quinault fishers fish the river systems
17 and the ocean commercially?

18 A Yes.

19 Q And do you know where those fishermen sell the salmon that
20 they harvest?

21 A Quinault Pride Seafood.

22 Q And is that owned by the Quinault Indian Nation?

23 A It's a wholly owned -- a company owned by the Quinault Indian
24 Nation.

25 Q Do you know how many employees it employees?

1 A Approximately twelve full-time. And seasonally they can
2 swell to probably 50, 60, at least in the processing plant in
3 Tahola.

4 Q And, Ed, when did you start salmon fishing?

5 A It goes back a long time, in a different time, in a very
6 beautiful place.

7 Q Can you describe what that experience was like?

8 A Well, as I mentioned earlier, my grandmother was from Hoh
9 River. About the turn of the last century, my grandmother and
10 her husband were asked to come to Tahola. And my great
11 grandmother was a midwife, and my great grandfather was a
12 blacksmith. So they moved to Tahola at the request of the tribe,
13 but that left deep roots in Hoh River. And I'm talking about a
14 time when I started to fish, it was pre-Boldt. And I was seven
15 years old when my sister married my brother-in-law, Howard
16 Hudson.

17 At that time in the village of Hoh River, it was very small,
18 six or eight homes, three or four families. There was not the
19 population in the state of Washington that there is now. My
20 sister kind of took care of the three of us, so I spent a lot of
21 time there. My brother-in-law would say, Do you want to go
22 fishing? And I'd say, Yeah.

23 So in the morning, he would -- my sister would get us ready.
24 She would feed us and then make a sack lunch and would normally
25 pack two thermoses of coffee, and we'd go down to the river, and

1 we fished out of dugout cedar canoes.

2 I never saw a skiff until I was about 14 or 15 years old on
3 the Hoh River. Everybody fished out of dugout canoes. And he
4 would get us ready, and he'd tuck me in the bow of the canoe, and
5 up the Hoh River we'd go. It was motorized. It had a 20 horse
6 Mercury motor on there. We'd often go near the 101 -- the 101
7 bridge, 14 miles or so up the river.

8 I can't even tell you how great it was. I'd look back at my
9 brother-in-law. The water would spray from the motor, you know,
10 and he'd just -- it was just such a -- you know, in today's
11 world, you would call him an icon, but he was a teacher to me.
12 Now he was going to teach me something. And we'd get up to where
13 we were going and he'd pull to shore and he'd have a cup of
14 coffee, and he'd tell me about how it was when he was a little
15 boy on the Hoh.

16 And when he was little, he pointed to a little building, as
17 we were going up, and then he told me, he says, Do you see the
18 house way over there? I said, Yeah. He said, Well, that's where
19 I went to school, in a one-room schoolhouse. And it's on Missy
20 Barlow's ranch.

21 So we'd have our coffee and then he would -- the first time
22 he told me, he says, This is what I'm going to do. We're going
23 to get out here a little bit with our poles, and then I am going
24 to throw the net out, and then we're going to be near shore. We
25 were drift fishing. So later on, when he was kind of having a

1 tough time, he would tell me, Grab the pole. It was about 16,
2 maybe 12-foot long poles. And that was to pull you along with
3 the canoe. And he'd bring in the fish, and we'd go ashore. And
4 he'd take the net out, and he'd take the fish out, and he'd wrap
5 the net the way it's supposed to be, and we'd sit down and he'd
6 have a cup of coffee, and he'd teach me about what we're doing
7 here. You know, I would say, How come we're doing it right here?
8 And he'd say, Well, you see how the river runs? You see where
9 the channel is, and you see the big rocks? He was teaching me
10 about where salmon travel and where they go to rest and where
11 it's easier to swim, not in the current.

12 That was a -- I learned every time. Eventually he gave me
13 more and more responsibility, including how to hang a net, how to
14 mend a net, what knots -- you know, how we tie things, how we use
15 the resources that are around us while we're fishing for salmon
16 in the river.

17 Q So he essentially taught you how to fish?

18 A Yes, he did.

19 Q And at some point, did you start fishing by yourself?

20 A Yes, I did, I guess in kind of two different ways. Along
21 about the time that we started to have our first skiff was also
22 about the time that it was time for me to take over the
23 operations while my brother and brother-in-law went hunting.
24 They'd go up the river and go elk hunting. The very first time,
25 I was scared, and I was reluctant. They basically pushed me

1 offshore, and down the stream I went. And they said, you know,
2 If you're scared of the ripple, wait until the tide starts to
3 come in and the ripple goes away, and then you can come back to
4 the landing.

5 And what I would do was tend a stationary net at the mouth of
6 the Hoh River. I wasn't challenged with going up the river. But
7 as I stayed and fished in the Hoh area for many, many years, I
8 would fish with my brother-in-law, sometimes with his older
9 brothers, never independently, always as a helper for them in
10 their fisheries, way into the '80s, way past the Boldt Decision.

11 And we did so because we had agreements because we had
12 intertribal -- we were Quinault treaty area, and the Quinaults
13 and the Hohs and Quileutes often went to different rivers and
14 fished with family and moved around a lot.

15 But in later times, those agreements went away. But after
16 the Boldt Decision, I was one of the first to fish in the
17 Chehalis system on the Chehalis River, and I've been there ever
18 since. And that is my own -- under my own gear and my own
19 grounds and my own opportunity.

20 Q So you fish the Chehalis River now?

21 A Yes, I do.

22 Q And do you fish that river commercially?

23 A Yes, I do.

24 Q And when you were talking about your family learning how to
25 fish, did your family rely on salmon, both economically and for

1 subsistence purposes?

2 A Yes. When I talk about my Hoh River family, it's exclusive,
3 the only income that my brother-in-law has ever known, and he's
4 73 years old. It was his entire life.

5 Q Are there tribal members now who rely on salmon fishing to
6 support themselves economically?

7 A In the Quinault Tribe, there are several.

8 Q And does your family still rely on salmon as a source of
9 economics?

10 A Very much so. I have nephews that fish full-time and work, I
11 guess seasonal work when it's available.

12 Q Now, in Quinault practices -- well, first off, are you
13 familiar with the role salmon has played in the Quinault culture
14 and tradition?

15 A Well, in our language, the word for "salmon" is the equal
16 word for "food." It's very much a part of us as Indian people.
17 The salmon were the buffalo of the great plains when there were
18 60 billion. You know, salmon are our buffalo. It is intertwined
19 within our culture. Our songs, our ceremonies, our subsistence
20 coincide with the salmon. When salmon are not plentiful, we
21 suffer. When salmon are plentiful, we basically are rejoicing,
22 we're happier, but we're also mindful of what that means to us.
23 It means that when they're plentiful, that you take care of your
24 harvest, you take care of your needs, your smoke and your can and
25 your freezing, all of those things.

1 And always, we take care of our elders. We take care of
2 those that can't provide for their selves first and foremost: our
3 babies, our grandmothers, our grandfathers and our children, and
4 our elders. That's just the way Indian people are.

5 Q And salmon is an important part of taking care of the
6 children and the elders?

7 A Yes, it is.

8 Q And you mentioned ceremonies. How in Quinault culture is
9 salmon used ceremonially? Can you give us a brief description of
10 that?

11 A Well, salmon are used in all events as well as all of our
12 foods. Salmon is the center pin, for instance, of our culture.
13 If you look at Quinaults, we have a particular stock of salmon
14 called the Quinault Blue Back, or the Sockeye. It's a Sockeye
15 salmon. It is known actually throughout the world.

16 It is basically the foundation of who we are. We're talking
17 about a run of fish that once numbered into a million. In the
18 last century, there were runs of a million fish. In the last
19 seven years, we had the lowest run ever recorded, at like 7,200
20 fish. So our connection is deep. The relationship to the salmon
21 is ever present.

22 And we use salmon for name givings. We use salmon for
23 deaths, for burials, for recognitions, for birthdays. Ceremonial
24 events, we would use particularly the Quinault Sockeye.

25 Q When you testified that -- I think you said Blue Back; is

1 that correct?

2 A That's correct.

3 Q When you said the Blue Back is who we are, can you tell me
4 what that means to you? What does that mean, "who we are"?

5 A Well, you know, I guess it's the run of fish that the
6 Quinalts really identify with. It's probably the strength of
7 that fish that drove our economies. If you had, you know, back
8 in 1923, 700,000 dimes, you were doing pretty well, because
9 that's what they went for, about a dime a fish.

10 It's not only that part of it that it provides, but it
11 provides the income and the opportunity to provide for your
12 families. And we have a lot of folks that still fish. When you
13 look at the Village Queets that's out on the Olympic Peninsula,
14 it's a hundred miles from Aberdeen and Hoquiam, which is the
15 nearest population center, and a hundred miles from Port Angeles.
16 It is a small village at the mouth of the Queets River where we
17 have 70 percent unemployment, when you talk about job access.
18 But when there's fishing opportunity, all the fishermen are
19 fishing. That's how they derive most of their income.

20 Q Now, you talked a little bit about the diminished runs of the
21 Blue Back salmon. Have there been any other Quinalt fishing
22 areas that have been recently closed because of diminished salmon
23 runs?

24 A We're like a lot of areas in the fact that our spring Chinook
25 are in trouble on the Queets, in Grays Harbor, Humptulips -- both

1 on the Hump Tulips and the Chehalis side. Those are stocks that
2 are very troubling to us.

3 Q And how have these -- I guess for lack of a better word, how
4 have these diminished salmon runs affected you or your family?

5 A Well, not unlike most places that deal with tribes that deal
6 with abundance, when you can't provide for your families, it's
7 not good. You have to look to other sources of income. And out
8 on the Washington coast, there aren't many places to do that.

9 Q And based on your knowledge and experience, what is your
10 opinion, do you think more Quinalts would fish if there were
11 more fish, if the runs were as great as in the past?

12 A Yes. And I base that on the fact that we have fisheries that
13 are open for folks to come and fish when there are openings, but
14 they simply look at whether or not they think they can prevail
15 all the costs in order to do so, then it gets pretty tough for
16 some of them to make that decision.

17 Q You testified that you were taught how to fish by your
18 brother-in-law. Is that how most Quinalt members are taught how
19 to fish, by a family member or somebody that's a fisherman?

20 A That is the way that I understand it, that it's generational.

21 Q So it's passed down?

22 A It's passed down, yes.

23 MR. NIELSEN: I have no further questions.

24 THE COURT: Cross-examination for Mr. Johnstone?

25 CROSS-EXAMINATION

1 By Mr. Shaftel:

2 Q Good afternoon. My name is Doug Shaftel. We met once
3 before. Do you remember when I took your deposition?

4 A I do remember.

5 Q Mr. Johnstone, the Quinalts, they have control over the land
6 management -- the land use decisions within the Quinalt
7 Reservation; is that correct?

8 A We have jurisdiction, yes.

9 Q And do you agree that there are land uses that are impacting
10 the rivers that run through the Quinalt, the Quinalt's have the
11 regulatory power to influence those land uses; is that correct?

12 A That's correct.

13 Q And the Quinalts in fact -- quite a large part of the
14 Quinalt Reservation is logged, is that correct, contract logged?

15 A It is. It has been logged, and it continues to have logging
16 activities on the reservation.

17 Q It provides quite a bit of income for the Quinalt
18 Reservation; isn't that correct?

19 A I wouldn't say that at all.

20 Q It has historically, though?

21 A There have been times when the timber market has been
22 conducive to making money, yes.

23 Q And the Quinalts continue to -- well, strike that.

24 You mentioned earlier the Quinalt Blue Black salmon run?

25 A Yes.

1 Q That's a salmon run that runs through the Quinault River; is
2 that correct?

3 A It goes the 25 miles of lower Quinault into Lake Quinault and
4 then up to the upper Quinault.

5 Q And quite a bit of the Quinault River runs through the
6 reservation?

7 A All of it runs through.

8 Q Similarly, the Queets, you mentioned that there's been some
9 issues with the Queets.

10 Does part of the Queets in fact run through the reservation?

11 A Part of it. Most of it's state and federal.

12 Q You mentioned that you grew up fishing on the Hoh; is that
13 right?

14 A Yes.

15 Q But you don't have any personal knowledge of how the run
16 sizes have changed since you last fished it, do you?

17 A Not involved with management of the Hoh.

18 Q And on the Humptulips River, when I deposed you -- I'm sorry.
19 Let me phrase my question better.

20 I guess this would have been the season before this season,
21 the Chinook on the Humptulips were at harvestable levels; is that
22 correct?

23 A Without double-checking, that could be true.

24 Q And you don't know whether or not the Chinook levels have
25 changed from the year prior to that, do you?

1 A Not without checking.

2 Q And similarly, the Coho on the Humptulips were harvestable
3 the year prior to this year?

4 A Well, the only correction I would make to where you are with
5 this is Grays Harbor is managed on the aggregate. The whole
6 system is managed by the total run of Coho for both the Chehalis
7 and the Humptulips for Chinook and for Coho. So it's an
8 aggregate picture that you look at. They're not managed river by
9 river like other systems under Hoh v. Baldridge. Although we
10 have agreed to escapement goals, they're managed on the
11 aggregate.

12 Q Was there something about my question that made it difficult
13 for you to answer as to whether or not Coho was harvestable on
14 the Humptulips --

15 A Because you may -- if you have ten fish, you may take and --
16 and five of them are harvestable, you may take six. So as long
17 as you have ten fish on the Chehalis, and you need to have six
18 over there, but you leave seven. So the combined numbers are
19 what you are managing for in order to meet your escapement.

20 Q Do you remember at my deposition -- I'm sorry. When I took
21 your deposition, I asked you: "What's your understanding of the
22 run sizes for the various stocks that run through the Humptulips
23 and how they compare to previous years?" This is on Line 6 of
24 Page 43.

25 And you said: "I think they were harvestable, Chinook and

1 Coho."

2 A Okay.

3 Q And you don't know anything about how the Coho runs on the
4 Humptulips compared to the year before, do you?

5 A So I'm trying to understand. Are you referring to that
6 question or a new question?

7 Q This is a new question. I'm asking, as you sit here today,
8 you don't know anything about how the Coho runs on the Humptulips
9 have changed -- I'm sorry, as far as harvestable levels have
10 changed between 2008 and 2007?

11 A I think generally they're up.

12 Q Now, as far as the run sizes for salmon that the Quin harvest
13 in their U&A, they haven't changed much in the last five to ten
14 years; is that correct?

15 A What was the question again?

16 Q The harvestable runs of salmon in the Quinault usual and
17 accustomed fishing places have not changed much in the last five
18 to ten years; is that correct?

19 A I know there's been fluctuation. I don't know that I could
20 say that it hasn't changed much.

21 Q But that's what you said in your deposition; isn't that
22 right? Do you recall?

23 A I don't recall. You know, I manage these fisheries and --
24 when I do them, I do them real time, so they're actually managed
25 on what the particular instance is in that particular year. For

1 me to sit here and say I remember every management plan that I
2 ever negotiated or we fished on would be ridiculous. I just
3 don't recall.

4 Q You also don't recall whether or not the run sizes have
5 changed for salmon much in the last 20 years?

6 A They've changed. I believe they've changed. You know, I
7 just don't know what the particular numbers are.

8 Q You don't know whether or not they've gone up or they've gone
9 down?

10 A Well, I can tell you that Grays Harbor's been a limiting
11 factor for Coho in the Pacific Council process more than once in
12 the last 20 years.

13 Q Mr. Johnstone, you have a pretty positive relationship with
14 the Department of Fish and Wildlife; isn't that correct?

15 A I do have a good relationship with the Fish and Wildlife.

16 Q And in fact, it's your opinion that they do a pretty good job
17 co-managing the -- working with you --

18 A In the case of the Quinalts --

19 Q Can I finish my question?

20 A Go ahead.

21 Q Okay. Thank you.

22 They do a pretty good job working with you in managing
23 harvests; is that correct?

24 A I have a good relationship with now the director of the
25 Department of Fish and Wildlife.

1 MR. SHAFTEL: Thank you.

2 THE COURT: Mr. Nielsen, any redirect?

3 MR. NIELSEN: I have no redirect, your Honor.

4 THE COURT: Mr. Johnstone, thank you. You may step
5 down.

6 The plaintiffs may call their next witness.

7 MR. SLEDD: Your Honor, the plaintiffs have no further
8 witnesses in their case-in-chief. We may have rebuttal
9 witnesses. As I believe was discussed this morning, we may have
10 some additional exhibits we may have later. So we are not
11 resting, but we are done with our case-in-chief.

12 THE COURT: Thank you, Mr. Sledd.

13 Are the defendants ready to call their first witness?

14 MS. WOODS: Your Honor, the State would like to call
15 Dr. Paul Sekulich.

16 THE COURT: Good afternoon. If I could have you raise
17 your right hand to be sworn in.

18 I'm sorry. We swore you in this morning.

19 THE CLERK: Would you state your name for the record,
20 please?

21 THE WITNESS: Paul Sekulich.

22 THE COURT: We swore you in this morning. You remain
23 under oath.

24 You may inquire, please.

25 MS. WOODS: Thank you, your Honor.

DIRECT EXAMINATION

By Ms. Woods:

Q Good afternoon, Dr. Sekulich.

A Good afternoon.

Q I believe you described your educational background for the Court this morning. Has your educational background changed since this morning?

A Well, I've learned more.

Q Dr. Sekulich, are you currently employed?

A No, I'm not. I'm retired.

Q Where did you work before you retired?

A I worked for the Department of Fish and Wildlife in the habitat program. I retired in January of '03.

Q How long did you work for the Washington Department of Fish and Wildlife?

A It was about 25 and a half years.

Q Are you a fisheries biologist?

A Yes.

Q How many years of professional experience do you have as a fisheries biologist?

A I would say 35-plus.

Q Dr. Sekulich, did you prepare a Declaration in Lieu of Direct Testimony for this sub-proceeding?

A Yes, I did.

MS. WOODS: I would ask the courtroom deputy please to

1 hand Dr. Sekulich Exhibit W-087.

2 By Ms. Woods:

3 Q Do you have it?

4 A Yes. That's my declaration.

5 Q Would you please turn to Page 20.

6 A Okay.

7 Q Is that your signature?

8 A Yes, it is.

9 Q What's the date of your signature?

10 A March 19th, 2009.

11 Q Dr. Sekulich, do you adopt Exhibit W-087, the Declaration in
12 Lieu of Direct Testimony of Paul Sekulich, dated March 19th,
13 2009, as your direct testimony today?

14 A Yes, I do.

15 MS. WOODS: I would move for the admission of W-087.

16 MR. SLEDD: Your Honor, the plaintiffs do have an
17 objection. We had an objection in the pretrial order to one
18 paragraph of this declaration which we are withdrawing.

19 However, due to the -- there are ten paragraphs in the
20 declaration. Paragraphs 29 and 39 that are captioned "Response
21 to Tribal Use of the Fish Passage Priority Index." And based on
22 your Honor's ruling in the motion in limine matters, we believe
23 those are basically anticipatory rebuttal of evidence that has
24 now been excluded. We would ask that those paragraphs also be
25 excluded as irrelevant.

1 THE COURT: First steps first. You withdraw your
2 objection to Paragraph 46.

3 MR. SLEDD: That's correct.

4 THE COURT: Thank you.

5 Ms. Woods, what is the State's position regarding Paragraphs
6 29 through 39?

7 MS. WOODS: Mr. Sledd is correct that the heading for
8 that section is "Response to Tribal Use of the Fish Passage
9 Priority Index," and there are some sentences and sections in
10 those ten paragraphs that do refer to the Fish Passage Priority
11 Index, but there are also other sections in there that are
12 responsive to the evidence that was admitted this morning with
13 Mr. Rawson and Mr. Waldo regarding the use of habitat as a way to
14 estimate losses of fish production, and so it's our position that
15 those are still in the case the way it's now framed.

16 THE COURT: All right. I'll tell you what I'll do. I
17 won't exclude them, but I understand what the objection is from
18 the other side. And the Court certainly understands its own
19 ruling. And when reviewing 29 through 39, I will review it
20 carefully to see if it is in fact responsive.

21 Exhibit W-087 will be admitted at this point in time.

22 MS. WOODS: Thank you, your Honor.

23 There are also Exhibits W-087-A through L that are associated
24 with Dr. Sekulich's declaration. I believe that all but one of
25 them have previously been admitted. The one that I believe has

1 not been previously admitted is W-087-L.

2 THE COURT: No. I actually show W-087-H is not admitted
3 as well, but we can double-check with our clerk.

4 MS. WOODS: That is correct. It is W-087-H that has not
5 been admitted.

6 THE CLERK: That's what I show.

7 MS. WOODS: I would like to move for the admission of
8 that exhibit at this time as well.

9 MR. SLEDD: No objection from plaintiffs. We withdraw
10 our objection.

11 THE COURT: Thank you, Mr. Sledd.

12 087-H is admitted.

13 MS. WOODS: Thank you, your Honor.

14 By Ms. Woods:

15 Q Dr. Sekulich, during the 25 and a half years or so that you
16 worked for the Washington Department of Fish and Wildlife, what
17 kind of work did you do?

18 A Well, during the first twelve or so years, I was employed in
19 the harvest management division of the PRRHM program, the
20 Planning, Resource, Research and Harvest Management Program. I
21 started out there as a fish biologist at the lower level. I had
22 progressively more difficult challenges as I advanced in my
23 career there and ended up assistant chief of the Puget Sound
24 harvest division that was responsible for sport and commercial
25 fishing in the Puget Sound.

1 Q What did you do after that?

2 A After that, I became employed with the habitat program,
3 environmental restoration division manager. In that capacity, we
4 were involved with fish passage, screening, water diversions,
5 inventorying those facilities, correcting problems involved with
6 habitat restoration projects, and also the technical assistance
7 to outside groups in those same issues.

8 Q When did you first become involved in fish passage work?

9 A Actually, it was upon my employment in the habitat program,
10 which was in early 1991.

11 Q Did you have a role in getting the State's Fish Passage
12 Barrier Correction Program started?

13 A Yes, I did. When I took that job, there was a recently
14 signed MOA between the Department of Fisheries, the Department of
15 Wildlife and the Department of Transportation. And that
16 particular Memorandum of Agreement kind of set the stage for fish
17 passage.

18 What the agreement did is it addressed facilitating the HPA
19 process for work on DOT roadways, and we tied that with fish
20 passage. So the specific section in the MOA concerning fish
21 passage. We also addressed tying it to HPAs and inventorying of
22 fish passage barriers on DOT roadways.

23 Q The MOA that you referred to, is that Exhibit W-087-B?

24 A Yes, it is.

25 Q Was it your job to implement that MOA for the Washington

1 Department of Fish and Wildlife, Fisheries at that time?

2 A Yes, it was.

3 Q How did you go about doing that?

4 A Well, the first thing we did is pursued at the legislature
5 funding to start the implementation of the MOA after the
6 legislature cooperated and appropriated some funds for some
7 barrier correction projects. And to be in the inventory, we
8 secured an agreement with the Department of Transportation that
9 formalized that inventory and then also specified six projects
10 that would be corrected on DOT roadways.

11 Q And why six projects?

12 A Well, it's a little tough to answer, because when I stepped
13 into the job, it was -- I didn't know much about the magnitude of
14 the problem. So at that time, that was six projects that I knew
15 about, and that was it.

16 Q That interagency agreement that you mentioned, is that
17 Exhibit W-087-D?

18 A Yes, it is.

19 Q We will come back to that in a bit. You mentioned inventory.
20 What's inventory?

21 A Well, inventory is basically going out on all the DOT
22 roadways and looking at the facilities, the road crossings, and
23 inventorying those to see if there were fish passage barriers.
24 And in addition to that, we included a provision for
25 prioritization of those facilities for correction.

1 Q How do you figure out if something is a fish passage barrier?

2 A In the early years we relied on the expertise of people in my
3 staff involved with fish passage. It was kind of a judgment
4 call, outfall drop, slope of the culvert, velocities in the
5 culvert.

6 As we refined our technology through the years, we ended up
7 regimenting that approach and consummating all the methodology in
8 a manual, the first edition was 1998, and later added to in 2000.

9 Q Is that 2000 manual Exhibit W-087-E?

10 A Yes, it is.

11 Q What was your role in developing that manual?

12 A Well, my primary role was directing my staff to flesh out the
13 details of the inventory process. I provided a frame for
14 prioritization by originating the priority index methodology.
15 The specific methodology for the habitat assessment revolved
16 around that priority index methodology.

17 Q Did your staff continue to do inventories while you were at
18 the Washington Department of Fish and Wildlife?

19 A Yes, we did. At the time of my tenure through 2002, we had
20 increasing involvement with the Department of Transportation to
21 continue the inventory. Also during my tenure, we realized there
22 was additional benefit for starting to work with smaller
23 jurisdictions.

24 So we did outreach to several counties, as kind of a pilot
25 project, where we would volunteer to inventory the barriers on

1 county roadways, with the idea that we would end up cost sharing
2 arrangements for correcting some of those barriers. That was
3 kind of a jump start for the counties.

4 Later, in about 1997, we decided to also concentrate on our
5 own problems in the Department of Fish and Wildlife lands, so we
6 secured funding to also prosecute inventories of our own lands.

7 And in addition to that, using the manual, we thought it was
8 beneficial to also train outside groups for inventories, so we
9 did that. We had a technical assistance component where we used
10 staff that were adept at inventories, and their supervisors, and
11 actually did outreach to other groups to do inventories.

12 Q As these inventories progressed over time, were you surprised
13 in any way by the results?

14 A Surprised in what way?

15 Q Did things turn out the way you thought when you started
16 doing the inventories?

17 A Well, that is interesting. When I first took the job in
18 habitat management, as I indicated, my first exposure to fish
19 passage were these six DOT projects that we knew about. And as
20 we started conducting the inventory, it became I guess
21 progressively obvious that the magnitude of the problem was much
22 larger than we had originally anticipated.

23 Q I'd like to focus on those six projects for just a moment.

24 MS. WOODS: I am about to show Dr. Sekulich the second
25 page of 087-D.

1 By Ms. Woods:

2 Q Dr. Sekulich, do you see a list of projects near the top of
3 that page?

4 A Yes, I do.

5 Q Are those the six projects that you mentioned earlier?

6 A Yes.

7 Q Have these six been fixed?

8 A Yes, they have.

9 Q I am noticing that under the column heading "Project
10 District," it says, "baffles, fishway, log controls."

11 Would those be characterized as retrofits?

12 A Yes, they would.

13 Q What is a retrofit?

14 A Well, a retrofit is basically taking an existing crossing and
15 retrofitting it with either downstream/upstream controls, baffles
16 within the culvert, fishways, that type of thing, to afford fish
17 passage. We weren't really replacing the culvert.

18 Q Did the types of fish passage projects change as time went
19 on, in your experience?

20 A Yes, they did. These were relatively easy projects as a
21 whole, although I'd qualified that on Bulson Creek. That became
22 a much larger magnitude project, and it didn't get completed for
23 several years after this agreement.

24 But, yes, subsequent to that time, as project magnitudes
25 become larger and larger, costs have gone up. What's interesting

1 about this, if you look at the amount that was appropriated for
2 these projects, about \$280,000, that's certainly an order of
3 magnitude below what these DOT projects are costing today.

4 Q You mentioned prioritization and the development of the
5 prioritization process and the manual.

6 Why is it important to prioritize culverts for correction?

7 A Well, we felt it was important so that -- front load
8 benefits. We knew that some projects, you would gain more fish
9 or access for more fish, so that would be one aspect of
10 prioritization.

11 There are other aspects of how much it would cost to correct
12 a project, the status of the stocks that were affected, the
13 mobility of those stocks when you were dealing with anadromous
14 fish or only resident fish. So these are all factors that we
15 felt needed to be in the prioritization process.

16 It basically was a surrogate for a cost benefit, but we felt
17 it did a better job of prioritization than a formal cost benefit
18 analysis.

19 Q You testified a bit this morning about the Fish Passage
20 Priority Index, and you described a little bit about your role in
21 developing that. I would like to go into a little bit more
22 detail.

23 What is the Fish Passage Priority Index?

24 A Well, it is a unique number that is calculated for each
25 barrier culvert. And what that lends itself to is a comparison

1 of numbers from other barriers. The range that is expected with
2 utilization of priority index is 1 to 100. The higher the
3 number, the higher the priority. There are six factors within
4 the priority index. I think I alluded to some of those in
5 general terms.

6 Basically there are three modifiers within the priority index
7 for each species. That is the cost stratification of the
8 project, to correct it; the status of the stocks, whether they
9 are depressed or not; again, whether they are anadromous or not.

10 And then critical pieces of the priority index are the first
11 three factors. I used the BPH. The BPH represents B, being the
12 passability of the culvert, a rough approximation of that; P, the
13 productivity capability of the species that is being calculated,
14 those being different for each species; and then the habitat that
15 a species would utilize after the correction is made.

16 Those factors are multiplied together. There's a quadratic
17 root calculated for those factors for each species. And then
18 once those are calculated for each species within a drainage,
19 then those are added together to give you the final PI number for
20 that crossing.

21 Q How does the Washington Department of Fish and Wildlife
22 collect the information necessary to collect to compute a
23 priority index number for a culvert?

24 A Well, we've had inventory crews. And those that were
25 inventorying DOT roadways, we receive money from the Department

1 of Transportation to do that work. And basically what starts out
2 as a driving roads, looking where those crossings are, looking at
3 the site, taking measurements, assessing whether the facility is
4 a barrier or not.

5 If it's determined that it's a barrier, secondly, then
6 determine if there's a significant amount of habitat that the
7 barrier's affecting that is 200 meters upstream and downstream.

8 Once that threshold is met, then an in-depth habitat survey
9 is done where various measurements are made of the habitat to
10 determine the habitat that is unique to each species being
11 affected.

12 Q Once you've assembled all that information, what do you do
13 with it?

14 A Well, through the help of my staff, we developed a database
15 to compile all that information and do the calculations of the
16 priority index. It resides in what is called the Fish Passage
17 and Diversion Screening Inventory Database. That's undergone
18 several names. At one time, it was called SHEAR base.

19 But all the data for the inventory crews in Fish and Wildlife
20 are compiled there. All of the inventories that we did for
21 counties, the data resides there. And also if we provide
22 technical assistance to grant groups that secure money through
23 the SRF Board, those data also reside there.

24 Q When you calculate a priority index number for a culvert, do
25 you account for the presence of other fish passage barriers in a

1 watershed?

2 A We account for it only insofar as it's recorded as reach
3 breaks in our habitat surveys. When the priority index is
4 calculated, it treats those other barriers as transparent. The
5 reason we do that, we don't know when those other barriers are
6 being corrected. So by treating them as transparent, you do a
7 priority index that looks at potential habitat gain as if all
8 those barriers would be corrected at some point in time.

9 Q And by "transparent," what do you mean?

10 A What that means is if you're walking the watershed, and
11 perhaps there may be ten barriers, to look at the total
12 potential, you walk the whole stream past every one of those
13 barriers measuring the habitat, and those become an integral part
14 of the priority index. If you didn't do that, you would only
15 calculate a priority index up to the next barrier, and then you
16 would stop your survey. That wasn't our intent, because that's
17 drawing a conclusion that that next barrier and the eight after
18 that would never be fixed.

19 Q Optimistic way of looking at things.

20 If we fix a fish passage barrier culvert in a watershed that
21 has other barriers upstream, will the potential benefit of fixing
22 that barrier be immediately realized?

23 A Generally no.

24 Q Why not?

25 A Well, if you open the habitat and the fish start utilizing or

1 passing the previous barrier, they're going to butt up against,
2 in some magnitude, to the next barrier. And of course the amount
3 of that decline in potential production depends on the degree of
4 passability of subsequent facilities.

5 Q I think you testified you worked for the Washington
6 Department of Fish and Wildlife a little over 25 years?

7 A That's correct.

8 Q Why did you stay so long?

9 A I knew you were going to ask that. I guess the short answer
10 is I just really enjoyed working with people and supervising
11 people that were extremely dedicated to protecting and enhancing
12 the resources of the state. It would have been a very difficult
13 job had you not had good staff working for you to implement good
14 ideas, I guess act as you in your own ideas. It made it real
15 easy.

16 Q Are some of your staff in the courtroom today?

17 A Yes, they are.

18 MS. WOODS: Thank you.

19 THE COURT: Counsel, before you start, let me ask him
20 one question that may help you also in your cross-examination.

21 Dr. Sekulich, I haven't read your direct testimony as of yet.
22 But in all the years and all the work that you did, in looking at
23 how to address this very complex problem that everybody wants to
24 fix, if Mr. Monson's client over there came up with a pot of
25 stimulus money, a big pot, would you do anything different than

1 the way you've set it out?

2 THE WITNESS: In terms of the prioritization?

3 THE COURT: I don't want to make you nervous over there.

4 Yes.

5 THE WITNESS: No, not in terms of the prioritization
6 method.

7 THE COURT: Thank you.

8 You may cross-examine.

9 MR. SLEDD: Thank you, your Honor.

10 CROSS-EXAMINATION

11 By Mr. Sledd:

12 Q Good afternoon, Dr. Sekulich.

13 A Good afternoon.

14 Q I'm John Sledd. You'll probably remember we first met
15 underneath the conference table during the earthquake at your
16 first deposition?

17 A I think Mr. Hollowed was taking pictures.

18 Q The infamous cellphone pictures.

19 When you were employed at WDFW, you supervised a unit that
20 goes by the acronym of SHEAR; is that correct?

21 A Yes. That was a name I coined when I first took the job in
22 habitat management.

23 Q Can you spell it and tell us what it stands for?

24 A It started as S-H-E-A-R, which was Salmon Habitat Enhancement
25 and Restoration. That's when we were then the Department of

1 Fisheries and our responsibility was only for salmon.

2 Q And then in your last year or two with the State, there was
3 some reorganization of the SHEAR program. It sort of morphed
4 into the habitat and passage project section of the technical
5 applications division; is that correct?

6 A It did. There were some intermediate steps before then.

7 Q And the SHEAR program, when you were directing it, you
8 produced an annual report, did you not, to describe the
9 activities of the program?

10 A We didn't start the annual reports until probably the mid
11 '90s, but there were other reports that we jointly did with the
12 Department of Transportation.

13 Q But there those annual SHEAR reports, for example, in 1997 to
14 2001 or so --

15 A That sounds right.

16 Q And then after the name change, when that became part of the
17 technical applications division, the habitat and passage project
18 section, did that annual reporting continue until you left the
19 department?

20 A Yes.

21 Q And you supervised the preparation and did a good bit of work
22 on each of those annual reports?

23 A Yes. Most of the work was outlined, directing staff to
24 complete portions of the report. That's correct.

25 Q Now, you started doing habitat work at DFW, I believe you

1 testified, in 1990?

2 A Actually, it was 1991.

3 Q And it's your opinion, is it not, that prior to your starting
4 your tenure with the DFW, or the Department of Fisheries, a
5 significant portion or most of the culvert structures that were
6 installed in the state were barriers from the minute they were
7 installed; is that not correct?

8 A I believe there was a significant number that were.

9 Q And that opinion's based on your personal observation of
10 culverts as well as input from your staff while you were with
11 DFW?

12 A That's correct.

13 Q The 1990 MOU, Exhibit W-087-B that you were asked about, that
14 didn't enable DFW to do anything that it couldn't have done
15 before, did it?

16 A No, it didn't.

17 Q Because, as I believe you say in your declaration, there have
18 been fish passage laws on the books in the state of Washington
19 since the late 1800s.

20 A That's correct.

21 Q The 1990 MOU just profiled the need and raised people's
22 awareness of those laws; is that correct?

23 A That's correct.

24 Q If you could take a look at Exhibit 87-B. If you could look
25 down at the bottom of the first page. You should see there about

1 four or five lines below the word "purpose," it says, "In order
2 to accomplish this purpose, the respective participating agencies
3 hereby agree as follows:"

4 And then after that for several pages there's descriptions of
5 responsibilities. And to the left of each, there's an agency
6 acronym; is that correct?

7 A That's correct.

8 Q And if we turn to the eighth page, in the lower right, there
9 is a long number, T10 etcetera 40. It is the eighth page in.

10 There's a heading you should see in the middle of the page
11 that says "Fish Passage Barrier Removal and Maintenance Program."

12 A I see it.

13 Q The first item under that heading states, "The Department of
14 Transportation was to be responsible to," quote, "maintain
15 culverts and fish passage facilities in a manner which provides
16 continued fish passage for the life of the installation."

17 Do you see that?

18 A I do.

19 Q The Department of Transportation did not in fact maintain all
20 its culverts and fish passage facilities to provide continued
21 passage after this MOU, did it?

22 A Despite its best efforts, no.

23 Q As I understand the testimony -- you've been in the courtroom
24 pretty much the whole trial, haven't you?

25 A I have.

1 Q There's been some discussions about DOT funding for
2 corrections in reference to the I-4 program?

3 A Yes.

4 Q That's funding that is appropriated by the state legislature
5 to the Department of Transportation specifically for fish passage
6 barrier corrections, right?

7 A That's correct.

8 Q Now, the PI, or prioritization process that you just spoke
9 about a moment ago, is used for prioritizing DOT corrections that
10 are going to be funded with that I-4 funding, correct?

11 A That's correct.

12 Q It is not used for prioritizing corrections that are going to
13 be done as part of a road project that happens to have a barrier
14 in the project area?

15 A That's generally true, yes.

16 Q In that prioritization process for the I-4 funded
17 corrections, is a culvert with less than 200 meters of upstream
18 habitat treated differently than one that has more than
19 200 meters?

20 A In the inventory process?

21 Q In the prioritization process.

22 A Yes.

23 Q And the culvert with less than 200 is assessed, the data's
24 kept in the data base, but it's not prioritized for
25 correction with those I-4 funds?

1 A In general, that's true.

2 Q But do you just write off that barrier and say, we're not
3 going to fix it?

4 A No, we do not. It's kept on the databases of barriers with
5 the presumption that when there is road work safety mobility
6 projects, for example, that the fish passage barrier will be
7 corrected concurrent with that work.

8 Q And the reason you do that is because biologically, even
9 though it's a short amount, there's still going to be benefit
10 from correcting that?

11 A That's correct.

12 Q In your declaration -- you've still got it up there with you,
13 don't you?

14 A Yes.

15 Q Can we look at Paragraph 48? I'm sorry. You probably don't
16 have it.

17 You state in Paragraph 48 that when DFW formulated its
18 current fish passage regulations for culverts back in the 1990s,
19 there was not much information available on the swimming
20 abilities of juvenile salmon?

21 A I think I'm in the wrong place there. Is it 48?

22 Q Excuse me for a second. Sorry about that.

23 It states, "As of '94, little information was available about
24 the swimming abilities of juvenile salmon, so we used a six-inch
25 trout as the closest surrogate," correct?

1 A That's correct.

2 Q It's your opinion now that the six-inch trout standard is too
3 liberal in that it will not pass all juveniles?

4 A It will not pass all juveniles.

5 Q And it's too liberal in that regard?

6 A Yes.

7 Q The next paragraph, 49 in your declaration, describes some
8 juvenile fish passage research that was done by Pat Powers of DFW
9 about 15 years ago and then some by Battelle Labs more recently?

10 A That's correct.

11 Q The Battelle research was done for the same state contract,
12 was it not?

13 A Yes, the Department of Transportation.

14 Q But the results of that research have not been incorporated
15 into the DFW barrier assessment process, have they?

16 A Not directly, no.

17 Q You speak in Paragraph 47 about the process known as adaptive
18 management which resource managers use -- where they use research
19 to improve the way they do things?

20 A Yes, I see it.

21 Q Juvenile salmon passage. And in particular that six-inch
22 trout surrogate, is an area that would benefit from adapted
23 management, would it not?

24 A Yes, it would.

25 Q And of course in doing adaptive management, it would be

1 beneficial to have your tribal partners and their biologists
2 participate, along with state biologists?

3 A Yes.

4 Q Paragraph 48 states that the -- it describes the WAC when you
5 shifted from, as you described it -- you said best professional
6 judgment. That was the effects of its actually having defined
7 standards and they were put in regulations?

8 A That's correct.

9 Q You state in Paragraph 48 that was based on state-of-the-art
10 research when it was adopted in 1994?

11 A Yes.

12 Q But by the time you retired in 2002, you believed that more
13 work could be done in addressing juvenile fish passage?

14 A That's correct.

15 Q Is it your opinion that the barriers to Sockeye migration in
16 the Lake Washington system should be made passable whenever
17 that's possible?

18 A Yes.

19 Q And in the declaration, I believe Ms. Woods also asked you a
20 little bit about inventory work that was done early on in the
21 development of DFW's Fish Passage Program. And you mentioned
22 some county inventories?

23 A Yes.

24 Q And one of those that's mentioned in your declaration is with
25 Skagit County, correct?

1 A Yes.

2 Q And that inventory was done with the participation of the
3 Skagit River Tribes?

4 A Yes, it was.

5 Q And you spoke also in summarizing your declaration about a
6 cost-sharing program that DFW had in the mid to late '90s that
7 had fixed some county barrier culverts?

8 A That's correct.

9 Q Cost share means the State pays part of the cost of the
10 correction?

11 A It was a little more in-depth than that. What we did is we
12 volunteered to do the work, a cost-share arrangement, where the
13 county typically paid 50 percent, and we elected to do that to
14 kind of train the county in how that work should be done, in
15 addition to providing that additional resource.

16 Q In about the same term during the development of the DFW's
17 passage program, you also tried to include correction of nearby
18 private barrier culverts when you were fixing the state and
19 county culverts?

20 A Yes, we did.

21 Q So the State would also have ended up paying some of the
22 costs for that correction process?

23 A It wasn't exactly the arrangement that we had with counties.
24 We realized that the private barrier owners didn't have the
25 resources that the counties or cities would have. So we tried to

1 come up with an arrangement where the private barrier owner would
2 put forth any resources they had available.

3 Q And then the State would put forth its resources to help fix
4 the private owners' barrier?

5 A Which was normally over 50 percent of the cost.

6 Q Did the Department -- did you, when you were working on that
7 program, supervise it?

8 A Yes.

9 Q Did you ever consider using an enforcement mechanism to
10 compel those private parties to correct their barriers?

11 A I didn't personally, no.

12 Q You mention in Paragraph 43 of your declaration that the
13 State legislature in 1997 passed a law to create a fish passage
14 task force and then chartered the task force to come up with a
15 report to the legislature on how to create a fish passage barrier
16 program, correct?

17 A Would you say that again? I was kind of reading it.

18 Q Take a minute to read it.

19 A I've only seen the top four lines there.

20 Okay. Yes.

21 Q So the legislature created a task force with this '97
22 legislation and said, Go out and come back to us with a report on
23 how to create a passage barrier correction program?

24 A That's correct.

25 Q And you were a co-chair of that task force?

1 A I was, with Paul Wagner from Department of Transportation.

2 Q And Mr. Wagner was also a witness in this case?

3 A Yes.

4 Q And the two of you were the co-authors of the report that
5 ultimately was submitted to the legislature in accordance with
6 that statute, correct?

7 A Yes, we were.

8 Q And the work that was done by the task force, with the
9 members of the task force, investigated the facts surrounding the
10 creation of such a fish passage barrier correction program and
11 then reported your conclusions back to the legislature?

12 A Yes, we did.

13 THE COURT: Counsel, why don't we pause here and go
14 ahead and take our recess for the afternoon.

15 (At this time, a short break was taken.)

16 THE COURT: Mr. Sledd, we were on cross-examination of
17 Dr. Sekulich.

18 MR. SLEDD: Thank you.

19 By Mr. Sledd:

20 Q Dr. Sekulich, a culvert that is passable to fish in the
21 present can become a barrier over time due to changes in the
22 hydrology of the stream, correct?

23 A Yes, it can.

24 Q So if you fix a barrier and you want to make sure that it
25 stays passable in the future, you need a monitoring program to go

1 out and determine that that passable structure has not become a
2 barrier again, correct?

3 A Yes. You would want a monitoring program.

4 I might add to that, though, that the type of correction that
5 you make would determine the, I guess, frequency that you would
6 have to reinspect those facilities to see if they were still
7 passing fish.

8 Q So if you used correction designs that minimize the chance
9 for hydraulic changes to create an impassable condition, it could
10 lower your monitoring burden?

11 A That's correct.

12 Q When I was asking you about the 1997 legislative task force
13 report - or it may have been when I was asking you about the
14 SHEAR reports - you mentioned a number of other reports done
15 jointly with DOT. I want to ask you about one of those.

16 MR. SLEDD: Madam Clerk, if you could hand the witness
17 Exhibit AT-54, please.

18 THE WITNESS: What was the number again?

19 By Mr. Sledd:

20 Q This is AT-54. It's a Fish Passage Program Department of
21 Transportation Inventory Final Report.

22 A Can I just look at the screen?

23 Q That's absolutely fine. Whatever is easier for you.

24 Did your fish passage program work with DOT and prepare a
25 series of not quite annual, but as time went on became more close

1 to annual progress performance reports regarding the joint work
2 between DFW and DOT regarding DOT culverts?

3 A Yes, we did.

4 Q And this is one in that series of reports?

5 A Yes.

6 Q And if I am correct, it has already been admitted in
7 evidence.

8 You approved the content of these reports when these were
9 prepared by staff under your supervision?

10 A That's correct.

11 Q If we could turn to Page 3 in the final report, the first
12 paragraph. Four lines down there, it states, "One
13 habitat-related cause for weakening of salmonid production, which
14 can be easily resolved, is human-made barriers to fish migrations
15 caused by improper placement of road culverts."

16 Do you see that?

17 A Yes, I do.

18 Q By that statement that it is easily resolved, what you and
19 your staff meant was that fish passage barriers were easier to
20 fix than those habitat problems described in the previous
21 paragraphs, such as hydropower, habitat degradation, easier to
22 deal with than oceanic events; is that correct?

23 A That's correct.

24 Q If we could look to Page 2, please, in Exhibit AT-54. In the
25 third paragraph on that page, the next-to-the-last sentence --

1 are you with me?

2 A I think so. On my screen here -- is it the last full
3 paragraph?

4 Q Yes, it is.

5 A Okay.

6 Q The next-to-last sentence in that last full paragraph on your
7 screen states, "A total potential spawning and rearing area of
8 1.6 million meters squared," and some change, "is currently
9 blocked by WSDOT culverts on the 177 surveyed streams requiring
10 barrier resolution. This is enough wetted stream area to produce
11 200,000 adult salmonids annually."

12 Now, you were the major player in preparing that statement
13 and doing those calculations, were you not?

14 A Yes, I was.

15 Q And those calculations are based on the percent passability,
16 or B factor, the P or production factors, and production
17 coefficients, and the H, or habitat values, that are described in
18 the priority index?

19 A With the understanding it is all under the umbrella of
20 potential production.

21 Q Correct. So that is the potential annual adult equivalent
22 salmonid production?

23 A That's correct.

24 Q An adult equivalent means that's a fish that actually would
25 end up in either harvest or escapement as an adult?

1 A That's correct.

2 Q So that it's after ocean mortality and other mortality
3 factors?

4 A Yes.

5 Q You included that statement about the 200,000 fish in this
6 final report in order to convey to the state legislature that
7 there was a real benefit to the money the legislature was
8 appropriating for culvert corrections, was it not?

9 A That's correct.

10 Q And I believe your declaration describes these factors in the
11 PI and the BPH combination as being properly used only in a
12 relativistic sense, to compare the benefits between one project
13 and another?

14 A For that purpose, and also to compare correction schedules,
15 where it's still a relative comparison.

16 Q This 200,000 additional salmon statement was not comparing
17 the relative benefits of two projects, though?

18 A It was not, but it was a result of a cost benefit analysis
19 that I did at that time.

20 Q But it was not comparing two different projects?

21 A No, it was not.

22 Q And it was not comparing two different schedules?

23 A No. It was a result of such analysis.

24 Q But it's not stated in the report?

25 A That's correct.

1 Q You said this is an outgrowth, I believe, of a cost benefit
2 analysis?

3 A That's correct.

4 Q And you did that analysis?

5 A Yes.

6 Q But in your opinion, it's impossible to do a cost benefit
7 analysis on a single culvert and determine what the benefit of
8 the fish coming back to a single correction is?

9 A I don't think it's impossible, but it's very difficult.

10 Q Dr. Sekulich, I'm going to read to you the question and
11 response from your deposition of April 22nd of 2009, Page 69 at
12 Lines 3 to 9.

13 Question: "So the legislature, you think, wanted a
14 project-by-project cost benefit?"

15 Answer: "Yes."

16 Question: "And you didn't think that was possible?"

17 Now, if you wanted to do a cost benefit on the overall
18 programmatic level, not individual culverts but the whole
19 correction program, you believe you could do that?

20 A I believe it's much easier and it makes more sense.

21 Q And if you wanted to do that, you don't know of any better
22 method to do than the BPH method, the percent passability, the
23 cost of production coefficient times the habitat areas, do you?

24 A In my opinion, on an individual project, the priority index
25 methodology is the best.

1 Q And if you want to prepare an estimate for the entire
2 program, you don't know of a better methodology than that?

3 A Than the priority index methodology or the cost benefit
4 analysis?

5 Q Than the BPH methodology that's a portion of the priority --

6 A It's a portion. I think it's a good methodology, yes.

7 Q And you don't know of a better one to come up with a cost
8 benefit for the entire --

9 A Not without thinking about it more, no.

10 MR. SLEDD: If we could have on the screen, please -- if
11 I could have the clerk deliver to Dr. Sekulich Exhibit AT-154?

12 I'm sorry, your Honor. It's not admitted yet, so perhaps I
13 should have it on the screen and not publish it to the witness.

14 By Mr. Sledd:

15 Q I'll botch this, but it's my last question.

16 A Are you hoping it's a good one?

17 Q It's a doozy.

18 Do you recognize that document, Dr. Sekulich?

19 A I do.

20 Q And it has your name on it underneath the title, correct?

21 A Yes.

22 Q And is that a document that -- the date down there,
23 November 9th, 1999, do you see that?

24 A Yes, I do.

25 Q And that was during your tenure with the Department of Fish

1 and Wildlife?

2 A Yes.

3 Q And this document has your name on it?

4 A Yes, it does.

5 Q It indicates that you're a fellow author?

6 A I was primary author.

7 Q It says, Dr. Paul Sekulich, Washington Department of Fish and
8 Wildlife." That's to indicate that you did this as part of your
9 employment with WDFW?

10 A That's correct.

11 Q And it's describing some of your work that was done in the
12 course of your employment?

13 A I don't know if it was describing my work. It was positing
14 inventory process to be funded by the SRF Board.

15 Q But it was part of your work to posit that inventory process?

16 A Yes, it was.

17 MR. SLEDD: I have no further questions, your Honor.

18 Thank you, Dr. Sekulich.

19 THE WITNESS: Thank you.

20 THE COURT: Redirect.

21 REDIRECT EXAMINATION

22 By Ms. Woods:

23 Q Dr. Sekulich, the Court asked you a question about if Peter
24 Monson's client sent you a pile of money, would you do anything
25 different, and I believe you responded with respect to

1 prioritization.

2 I'd like to phrase a similar question a little bit
3 differently. If you had a big pot of money, regardless of the
4 source, what would you do with it in a culvert program?

5 A I guess I would take the existing methodology and the
6 comprehensive plan for prioritizing bigger culverts, take that
7 list and accelerate the correction schedule with the increased
8 money.

9 Q I'd also like to clarify, we've been talking about the Fish
10 Passage Priority Index and how that's used for prioritization.

11 It's used for prioritization of culvert corrections; is that
12 right?

13 A That's correct.

14 Q Is it used for prioritization of anything else?

15 A No, it's not.

16 Q Mr. Sledd asked you some questions about the swimming
17 abilities of six-inch trout and inventory methodologies based on
18 that.

19 If a culvert is designed to pass a six-inch trout, will it
20 also pass juvenile salmon some of the time?

21 A Yes.

22 Q Mr. Sledd also asked you some questions about a culvert
23 inventory that was done in the Skagit Basin, and he mentioned the
24 participation of the indian tribes in that area.

25 Did you have a court order in place requiring you to

1 collaborate with the tribes to do that inventory?

2 A No, we did not.

3 Q Mr. Sledd also asked you some questions about enforcement of
4 fish passage laws in the state of Washington, and he asked
5 whether you would consider an enforcement mechanism.

6 Do you remember that?

7 A Yes, I do.

8 Q I believe the two of you also went through some examples of
9 collaborative projects that involved counties and other entities?

10 A Yes.

11 Q Was there some conscious decision in the Department of Fish
12 and Wildlife to choose collaboration over enforcement as a way to
13 fix fish passage barriers?

14 A Well, that's a good question. I guess I took it upon myself
15 to use a collaborative approach, and I was never told to do
16 otherwise; felt that would not have cost any more money or
17 resources to use a collaborative approach to correct fish passage
18 barriers as using a strict enforcement approach.

19 Q Do you have an opinion about whether it works better to use
20 one approach or the other?

21 A Well, personally, I thought it would be better to use a
22 collaborative approach. One thing you get out of such approach
23 is people tend to listen to your ideas more and realize their
24 responsibility for maintaining a barrier that's been corrected
25 subsequent to the correction.

1 Q Were you in the courtroom when Mr. McHenry talked about a
2 project in the Salt Creek watershed?

3 A I recall him mentioning several corrections in the Salt Creek
4 watershed.

5 Q Would that be an example of the kind of collaborative project
6 that you were talking about?

7 A I wasn't involved with it, but it sure sounded like it. It
8 sounded like there were various ownerships involved, including
9 state agency, DNR, so that's an example of a collaborative
10 approach, yes.

11 Q Mr. Sledd asked you about the 200,000 fish number that is in
12 the 1997 progress report for DOT barrier correction, Exhibit
13 AT-054?

14 A Yes, he did.

15 Q That 200,000 fish number, was that a statewide number?

16 A Yes.

17 Q In your opinion, can the BPH and the priority index be used
18 to predict the number of fish that will be produced from fixing a
19 particular culvert?

20 A No, I do not.

21 Q Do you have an opinion about whether the current approach to
22 salmon recovery is a good one?

23 A Well, not having been directly involved with it for several
24 years, at the time my tenure ended with the Department of Fish
25 and Wildlife, there were --

1 MR. SLEDD: Objection, your Honor. He testified he
2 hasn't been involved with it for several years. It's speculative
3 about the time frame.

4 THE COURT: The objection is sustained without further
5 foundation, Ms. Wood.

6 By Ms. Woods:

7 Q Dr. Sekulich, have you been involved in salmon activity since
8 you retired?

9 A Yes, I have.

10 Q What kinds of activities?

11 A I've been on contract with the Department of Transportation,
12 Department of Fish and Wildlife on fish passage and related
13 environmental issues.

14 Q Is that part of an overall salmon recovery strategy, as far
15 as you know?

16 A In terms of my involvement, it was fish passage and chronic
17 environmental deficiencies, which would be part of a
18 comprehensive package.

19 Q Do you believe that comprehensive package is a good one?

20 MR. SLEDD: Your Honor, I'm going to object. We have a
21 stipulation that the direct testimony would be limited to what
22 was in the testimony. We summarized for half an hour. This is
23 going beyond the scope of what was in the report.

24 THE COURT: It is beyond the scope.

25 But, Dr. Sekulich, I want to hear your answer.

1 THE WITNESS: What I was waiting to say is a followup.
2 During my tenure with Fish and Wildlife, even in my own unit, we
3 were not just involved with fish passage. It was also with
4 habitat restoration projects and also screening unscreened water
5 diversions, so it was a comprehensive approach that involved
6 those perturbations of the habitat.

7 Also in terms of involvement with the SRF Board and giving
8 advice to the SRF Board, there were habitat integrity issues that
9 I think are very important, not just passage issues; habitat
10 integrity being the actual restoration of the habitat, riparian
11 rebuilding, creating off-channel rearing areas, that type of
12 thing.

13 So in that context, the comprehensive approach, I think, was
14 appropriate. I don't think you can address just fish passage or
15 preventing fish access into unscreened water divisions or
16 diversions, but also the integrity of the habitat.

17 By Ms. Woods:

18 Q Dr. Sekulich, would it be a good idea, in your opinion, to
19 spend all of our money on fixing culverts without taking into
20 consideration other elements of a comprehensive plan for salmon
21 recovery?

22 A No, I do not.

23 Q And why not?

24 A Well, I think you need the comprehensive approach that
25 addresses various limiting factors in specific watersheds. And I

1 think you have to address those all to really have a good success
2 rate in your efforts.

3 MS. WOODS: Thank you.

4 THE COURT: Thank you, Doctor. You may step down.

5 The State's next witness?

6 MR. SHAFTEL: Your Honor, if it's all the same to the
7 Court, both parties have talked and would be happy to call the
8 next State's witness on Monday so the cross-examination could
9 take place directly after the direct.

10 THE COURT: So you want to quit half an hour early? How
11 are we doing in terms of time, in terms of the estimation of how
12 much time it would take?

13 MR. TOMISSER: I think we're probably ahead of schedule,
14 your Honor. At the current pace, I think that we will conclude
15 probably before the 29th, I would think. At this point, I'm not
16 concerned that we're going to run out of time.

17 MR. SLEDD: We are ahead of where we expected to be,
18 your Honor.

19 THE COURT: Boy, how rarely do I hear that? That's
20 great.

21 Tomorrow, of course, you don't -- we have a criminal
22 calendar, so we will not be in session tomorrow. We will be in
23 session then Monday, Tuesday. Wednesday and Thursday, the Court
24 will be shut down, and I'm not in town. And then we're back in
25 court on Friday. All right?

1 MR. MONSON: I have a question, your Honor. We have one
2 rebuttal witness who will be coming from out of state, and I'm
3 just trying to understand the best time to call him to ask him to
4 be here. Would Friday -- do you think Friday the State will be
5 finishing its case, and that would be appropriate for rebuttal
6 testimony to be heard?

7 THE COURT: And even if they're not done, we can always
8 take that person out of order. Okay?

9 MR. MONSON: All right. I'll try to have him here on
10 Friday.

11 THE COURT: Other than that, have a great three-day
12 weekend. I like the collaborative effort testimony given by
13 Dr. Sekulich up here.

14 So if you should happen to meet anywhere during the weekend
15 and decide that you've got a solution, I would not be unhappy.
16 Have a great weekend. We'll be at recess.

17 (Adjourned)

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CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning